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46
REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

JULY TERM, 1887.

VOLUME XXII.

BY

GUY A. BROWN,

OFFICIAL REPORTER.

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By GUY A. BROWN, REPORTER OF THE SUPREME COURT,
In behalf of the people of Nebraska.

THE SUPREME COURT
OF
NEBRASKA.
1887.

CHIEF JUSTICE,
SAMUEL MAXWELL.

JUDGES,
M. B. REESE,
AMASA COBB.

ATTORNEY GENERAL,
WILLIAM LEESE.

CLERK AND REPORTER,
GUY A. BROWN.

DEPUTY,
HILAND H. WHEELER.

DISTRICT COURTS

OF

NEBRASKA.

JUDGES.

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THOMAS APPELGET, . . .	FIRST DISTRICT.
SAM. M. CHAPMAN, . . .	SECOND DISTRICT.
ALLEN W. FIELD,	SECOND DISTRICT.
E. WAKELEY,	THIRD DISTRICT.
LEWIS A. GROFF,	THIRD DISTRICT.
M. R. HOPEWELL,	THIRD DISTRICT.
GEO. W. DOANE,	THIRD DISTRICT.
A. M. POST,	FOURTH DISTRICT.
WILLIAM MARSHALL, . . .	FOURTH DISTRICT.
W. H. MORRIS,	FIFTH DISTRICT.
T. L. NORVAL,	SIXTH DISTRICT.
W. F. NORRIS,	SEVENTH DISTRICT.
ISAAC POWERS, Jr., . . .	SEVENTH DISTRICT.
WILLIAM GASLIN, JR., . .	EIGHTH DISTRICT.
F. B. TIFFANY,	NINTH DISTRICT.
T. O. C. HARRISON, . . .	NINTH DISTRICT.
F. G. HAMER,	TENTH DISTRICT.
J. E. COCHRAN,	ELEVENTH DISTRICT.
M. P. KINKAID,	TWELFTH DISTRICT.

STENOGRAPHIC REPORTERS.

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P. E. BEARDSLEY,	FIRST DISTRICT.
MYRON E. WHEELER,	SECOND DISTRICT.
OSCAR A. MULLON,	SECOND DISTRICT.
B. C. WAKELEY,	THIRD DISTRICT.
C. C. VALENTINE,	THIRD DISTRICT.
J. B. HAYNES,	THIRD DISTRICT.
THOS. P. WILSON,	THIRD DISTRICT.
FRANK G. NORTH,	FOURTH DISTRICT.
EDWIN R. MOCKETT,	FOURTH DISTRICT.
S. A. SEARLE,	FIFTH DISTRICT.
FRANK TIPTON,	SIXTH DISTRICT.
EUGENE MOORE,	SEVENTH DISTRICT.
GEORGE COUPLAND,	SEVENTH DISTRICT.
F. M. HALLOWELL,	EIGHTH DISTRICT.
E. B. HENDERSON,	NINTH DISTRICT.
CHAS. W. PEARSALL,	NINTH DISTRICT.
JOHN W. BREWSTER,	TENTH DISTRICT.
O. C. GASTON,	ELEVENTH DISTRICT.
A. L. WARRICK,	TWELFTH DISTRICT.

REPORTER'S NOTES.

The volume of laws quoted as the "Revised Statutes" refers to the edition prepared in 1866 by E. Estabrook.

The volume of laws quoted as the "General Statutes" refers to the edition prepared in 1873 by Guy A. Brown.

The volume of laws quoted as the "Compiled Statutes" refers alike to the first edition, 1881, and subsequent editions of 1885 and 1887, prepared by Guy A. Brown.

Acts of various years are cited by reference to volume of laws and the year in which they were passed.

The syllabus in each case in this volume was prepared by the judge writing the opinion, in accordance with rule 18.

Lincoln, April 1, 1888.

PRACTICING ATTORNEYS.

Admitted since the publication of Vol. XXI.

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RULES OF SUPREME COURT.

Adopted at the July Term, 1887.

1. [SITTINGS OF COURT.]—The regular public sessions of this court for the argument of causes will open on Tuesday of each week during the term at 8:30 o'clock A.M., and adjourn at 12:30 P.M. (unless for special reasons the court shall otherwise order), and so continue until the business of the district assigned for such week or weeks is disposed of; but there will be no public session of court on Mondays or Saturdays.

2. [MAKING UP DOCKET.]—Immediately after the time expires during which causes may be docketed for trial at a term of court, in accordance with section 584 of the civil code, the clerk shall make out and cause to be printed, without delay, the docket for the term. All causes from the same judicial district shall be placed together in the numerical order of the several districts, commencing with the first, and they will be taken up and heard in their order. Any cause may, however, be submitted, by agreement of both parties, on the records and briefs filed, whatever may be its place on the docket. Copies of the printed docket shall be forwarded by the clerk to each judge of the supreme and district courts and to each attorney having causes for hearing at the term.

3. [FAILURE OF PARTIES TO APPEAR.]—Whenever a cause is reached in its regular order on trial of cases, and neither party appears in person or by attorney, the cause shall be continued to the next regular term, unless briefs of both parties are on file, in which case it shall be submitted to the court in the same manner as if oral argument had been had.

4. [SUBMISSION OF CAUSES.]—Whenever a cause is reached, and the plaintiff in error or appellant fails to appear, and his brief is not on file, the defendant in error or appellee may have the case dismissed, or may submit it with or without argument. When the defendant in error or appellee makes default, and there is due proof of service of summons in error or notice of appeal having been made in the case, and briefs of plaintiff in error or appellant are on file, with proof of service thereof, within the time provided by rule 7, the plaintiff in error or appellant may proceed *ex parte*.

5. [CRIMINAL CASES—NO SECOND TRANSCRIPT NECESSARY.]—Whenever, in a criminal case, a writ of error shall be issued upon a certified transcript of a record, no further transcript shall be required or allowed to be taxed in the bill of costs, but the same transcript shall be returned with the writ, and shall be deemed sufficient, unless diminution or other objection thereto be suggested.

6. [TIME FOR ORAL ARGUMENTS.] In the oral argument of a cause the time allowed the parties on each side shall not exceed one hour, unless for special reasons the court shall extend the time.

7. [BRIEFS.]—In all cases brought into the court upon error or appeal, the plaintiff in error or appellant shall, at least fifteen days prior to the week in which the case shall be entered for hearing, furnish to the opposite party, or to his attorney of record, a printed copy of his brief of points and authorities relied on; and within ten days thereafter the defendant in error or appellee shall furnish the plaintiff in error or appellant, as the case may be, a printed copy of his brief of points and authorities relied on; and each party shall, before the argument of the cause, file with the clerk of this court six copies of his brief aforesaid, one for each judge of the court and the others for the reporter, and the party bringing the case into this court shall hold the affirmative. And in original cases briefs must be filed by the plaintiff and defendant in the same manner as in cases on

error or appeal. The briefs required by this rule shall be confined solely to the points of law made on behalf of the party filing the briefs and the authorities cited in support thereof, and shall refer to the page of the record by number where each question under discussion arises. In citing authorities the names of parties, volume and page of reports, or, if a text-book, the page and number of the edition must be given.

8. [SECURITY FOR COSTS.]—In each cause brought to this court the plaintiff in error, appellant, or relator shall, before the entry of the same upon the docket, give security for costs by filing a bond in the sum of \$50, with one or more sureties, conditioned for the payment of the costs of this court, which bond, in cases brought on error or appeal, must be approved by the clerk of the district court of the county from which such cause is brought, and in original cases by the clerk of this court. But this provision shall not apply in cases where a bond or undertaking has been filed in the court below, in accordance with the provisions of sections 588 and 677 of the civil code, but in such case the transcript filed must show the giving of such bond or undertaking, with the names of the sureties thereon; nor shall it apply in criminal cases where an affidavit of poverty is filed, as allowed by section 508, criminal code. The party bringing the cause to this court may, if he sees fit, deposit an amount with the clerk of this court sufficient to cover the probable costs of the action, and if he do so the bond required by this rule need not be given.

9. [COSTS.]—When the parties or their attorneys shall furnish their printed briefs in conformity to the rules of this court, it shall be the duty of the clerk to tax a printers' fee at the rate of one dollar for every five hundred words embraced in a single copy of the same, against the unsuccessful party not furnishing the same, to be collected and paid to the successful party as other costs. When unnecessary costs have been made by either party, the court will, upon application, order the same taxed to

the party making them, without reference to the disposition of the case.

10. [HOW BRIEFS PRINTED.]—All briefs shall be printed upon good book paper, small pica type, leaded lines; the printed pages to be four inches wide and seven inches long, with a margin of two inches, but the type in which extracts are printed may be small pica solid or brevier leaded. The heading of each brief shall show the title of the cause, the term at which the cause is set for hearing, the court from which the cause is brought, and the names of counsel for both parties.

11. [MOTIONS FOR RE-HEARING.]—A motion for a re-hearing may be filed as of course at any time within forty days from the filing of the opinion of the court in the case. Such motion must specify distinctly the grounds upon which it is based, and be accompanied by a separate printed brief. If the motion be sustained the cause shall stand for hearing at the next regular term.

12. [MANDATES.]—No mandate shall issue in any civil case during the time allowed for the filing of a motion for re-hearing, or pending the consideration thereof, unless specially ordered by the court.

13. [APPEAL CASES—NOTICE.]—In every appeal of a case in equity from a district court filed in this court, the clerk shall issue a notice to the appellee, notifying him of the filing of such appeal. The notice shall be served in the same manner as a summons in error and shall be returned within ten days after the officer receives the same, together with a certificate thereon of the manner in which it was served, and the fees for such services shall be the same as are allowed by law in similar cases, and shall be taxed in the costs of the case, unless notice shall be waived by the appellee.

14. [TRIALS IN ORIGINAL CASES.]—Whenever an issue of fact, which the law requires to be tried by a jury, shall be joined in proceedings in the nature of *quo warranto* or in *mandamus*, in the supreme court, the clerk

shall, at the instance of either of the parties, make out a *venire facias*, directed to a bailiff of this court, commanding him to summon from the state at large sixteen jurors having qualifications of electors, to appear before this court on the day mentioned therein, which day shall be determined by the court before the issuing of the *venire*. The *venire* shall be served and returned at least one week before the day named therein for the appearance of the jurors, and the bailiff shall attach to or incorporate in his return a list of the names of the jurors so summoned.

15. [SAME.]—Each party shall be entitled to three peremptory challenges, and challenges for cause may be made by either party, the validity of which shall be determined by the court. If, from challenges or other cause, the panel shall not be full, the court may order the bailiff to fill the same from bystanders or neighboring citizens having the qualifications of electors.

16. [SAME.]—The jurors summoned or called as provided, or such of them as are not set aside or challenged, as will make up the number of twelve, shall constitute the jury for the trial of said issue of fact.

17. [SAME.]—Each juror shall be entitled to the same compensation and mileage as are provided by law for jurors in civil cases in the district court.

18. [SYLLABUS OF THE POINT DECIDED.]—A syllabus of the points decided in each case shall be stated in writing by the judge assigned to prepare the opinion of the court, which shall be confirmed to the points of law arising from the facts of the case, which have been determined by the court; and the syllabus shall be submitted to the judges concurring in the opinion, for revision, before the publication thereof, and the same shall then be inserted in the book of reports without alteration, unless by consent of the judges concurring therein.

19. [RECORDS NOT TO BE REMOVED.]—The clerk of the court is answerable for all records and papers belonging to his office and filed therein, and they shall not be

taken from his custody unless by special order of the court, or on written consent of the attorneys of record for all the parties; but the parties may have copies when desired, by paying the clerk therefor.

20. [MANDAMUS—NOTICE.]—In all cases of application to this court for a writ of mandamus, a reasonable notice must be given to the respondent of the time when it will be made, accompanied by a copy of the affidavit on which it is based, unless for special reasons it is otherwise ordered; and except in urgent cases, the time of the hearing shall be during the week to which the causes from the the district in which the respondent resides are assigned.

21. [ADMISSION OF ATTORNEYS—FEES OF CLERK.]—In cases of the admission of attorneys to the supreme court, the clerk shall be entitled to charge and receive the following fees, and no more: In case of original admission upon the report of a committee, seventy-five cents. Admission on motion, fifty cents. In addition to the above, in all cases where the attorney admitted may desire a certificate printed or engraved on parchment, the clerk may charge and receive an additional fee therefor of one dollar.

22. [MOTIONS—NOTICE.]—All motions made or submitted to the court shall be in writing; and notice thereof, except motions for re-hearing, shall be served on the adverse party or his attorney of record at least one day before the hearing. Such notice shall conform to the provisions of section 574 of the code, be served by a sheriff, constable, or any disinterested person, who shall be entitled to fees allowed by law for service of a summons. The return of any such officer, or affidavit of any such person, shall be proof of service.

23. [SUBMISSION OF CONTROVERSIES.]—No questions not matters of actual litigation, except when presented by either house of the legislature or a committee thereof, shall be presented to the court, save in the method prescribed by section 567 of the code, and all such questions shall be filed and docketed as other causes.

24. [ATTORNEY GENERAL—APPEARANCE.]—The attorney general shall appear for the state and prosecute and defend all actions and proceedings, civil or criminal, in the supreme court, in which the state shall be interested or a party, and when from any cause it is impossible for him to appear at the hearing, he shall give the court notice thereof.

25. [CAPITAL CASES—SUSPENSION OF SENTENCE.]—In all criminal cases brought on error to this court, where it appears that the court below has passed sentence of death upon the plaintiff in error, it is ordered that the sentence and judgment be suspended until the further order of this court, and it shall be the duty of the clerk to endorse such suspension upon the transcript filed in said cause, and immediately transmit a certified copy thereof to the officer charged with the execution of said sentence.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JULY TERM, 1887.

PRESENT:

HON. SAMUEL MAXWELL, CHIEF JUSTICE.

" M. B. REESE, } JUDGES.
" AMASA COBB, }

22	33
36	584
22	33
70	685

THE STATE OF NEBRASKA, EX REL. M. C. BULLOCK
MANUFACTURING Co., v. H. A. BABCOCK, AUDITOR
OF PUBLIC ACCOUNTS.

1. **The Fiscal Year** commences on the first day of December of each year.
2. **Appropriations by Legislature.** The appropriations made by the legislature where there is no provision limiting particular cases to a shorter period, extend to the end of the first fiscal quarter after the adjournment of the next regular session.
3. ———: **SINKING TEST WELL.** Where an appropriation was made by the legislature of 1885 for the purpose of sinking a well in the salt basin, and the legislature of 1887 adjourned *sine die* March 31st, 1887, *Held*, That the appropriation of 1885 continued in force until August 31st, 1887. *People v. Swigert*, 107 Ill., 494; *People v. Lippincott*, 64 Id., 256; *People v. Needles*, 96 Id. 575, approved and followed.

SUBMISSION of controversy under Sec. 567 of the civil code. The submission was made by *Mr. William Leese, Attorney General.*

MAXWELL, CH. J.

This is an action to compel the defendant to draw a warrant on the treasury for the sum of \$1,675.

It is alleged in the petition in substance that in the year 1885 an act was passed by the legislature to provide for the sale and leasing of the saline lands of the state and the development of the saline interests thereof, by which act it was provided that the board of public lands and buildings be required to have all of the saline lands of the state appraised, advertised, and sold, and the funds received therefor to be deposited with the state treasurer, to constitute the saline fund of the state; that for the purpose of procuring a greater supply of brine than naturally flows on the salt basin, it was therein provided that whenever the funds derived from the sale of said saline lands should be sufficient, said board of public lands and buildings was authorized and directed to enter into a contract in behalf of the state for the purpose of sinking a well on such salt basin to such depth as, in the opinion of the board, would best subserve the interests of the state; that said board was authorized to issue vouchers to the contractor as the work progressed, upon which it was the duty of the auditor to draw his warrant upon the treasury against the saline fund for the amount of said voucher; that the sum of \$50,000, or so much thereof as was necessary, was appropriated out of the saline fund of the state for the purpose of carrying into effect the provisions of said act; that in pursuance of said act the board of public lands and buildings caused the saline lands to be appraised, advertised, and sold in the manner provided by law, and that lands to the amount of \$20,027.50 had been sold, and the money

received therefor placed in the treasury, and said sale was then adjourned; that in January, 1886, said board entered into a contract in writing with the relator, by the terms of which he was to sink a well on said salt basin to the depth of 2,000 feet for the sum of \$10,000; that the relator has fully complied with the terms of said contract in each and every particular, and said board has issued vouchers to him to the amount of \$9,465.64, upon which the auditor has drawn warrants on the saline fund; that on the 26th day of May, 1887, the relator completed said contract, and on said day the board of public lands and buildings issued a voucher to him for the sum of \$1,675.10, which on the 1st day of June, 1887, with an itemized account, was duly presented to the auditor and indorsed by him, "examined but not paid for the reason the appropriation for developing the saline interests of the state, and upon which this claim is drawn, ended, or lapsed, March 31, 1887," and for that reason the defendant refused to draw a warrant; that there is still in the saline fund in the state treasury the sum of \$10,563.56; that the amount due the relator under said contract for sinking said well was for labor done and performed after the 31st of March, 1887, and before the 26th day of May thereafter, and that the legislature adjourned March 31st, 1887, etc.

A copy of the contract is attached and made a part of the petition. The contract is carefully drawn, and the rights of the state amply guarded and protected, and it is apparent that both parties have acted in the utmost good faith. The auditor is ready to perform his duty in issuing a warrant, but is in doubt as to the proper construction of the law.

This action is brought under the provisions of section 567 of the code. The question for determination is—at what time the appropriation ceases to be available for the payment of claims on the treasury?

Sec. 19, Art. 3 of the constitution provides that, "each

legislature shall make appropriations for the expenses of the government until the expiration of the first fiscal quarter after the adjournment of the next regular session, and all appropriations shall end with such fiscal quarter," etc.

Sec. 9, Art. 4, Chap. 83, Comp. St., provides that, "the fiscal year shall commence on the first day of December in each year, and end on the thirtieth day of November in each year."

Sec. 18 of Art. 4 of the constitution of Illinois provides that, "each general assembly shall provide for all the appropriations necessary for the ordinary and contingent expenses of the government until the expiration of the first fiscal quarter after the adjournment of the next regular session * * and all appropriations, general or special, requiring money to be paid out of the state treasury from funds belonging to the state shall end with such fiscal quarter."

In *People v. Lippincott*, 59 Ill., 256, it was held that all appropriations ceased at the end of the first fiscal quarter after the close of a regular session of the general assembly. The question was again before the supreme court of that state in *People v. Needles*, 96 Ill., 575, where a considerable portion of the \$50,000 previously appropriated for the completion of the Douglas monument in Chicago had remained undrawn at the end of the first fiscal quarter after the adjournment of the regular session of the legislature. The court held that the constitutional provision applied to all appropriations of the public money, and was not confined to appropriations for the ordinary and contingent expenses of the government. Hence that the unexpended balance of the monument fund had lapsed. And in *People v. Swigert*, 107 Ill., 495, it was held that all appropriations, whether general or special, when otherwise unlimited, continue in force and are available for the purposes intended until the expiration of the first fiscal quarter after the adjournment of the general assembly, at which time all appropriations lapse and cease to be of any validity.

These cases are well considered and arose under a constitutional provision similar to our own. The words in that constitution that "all appropriations general or special" shall end with the fiscal quarter, etc., is no broader than the provision in the constitution of this state that "all appropriations shall end with such fiscal quarter," as the word "all" includes the whole. It is within the power of the legislature to appropriate money for a particular purpose, as to bore a salt well, and require the appropriation to be expended within a specified time less than the end of the fiscal quarter next after the adjournment of the legislature; and the provision is a limitation on its power, beyond which it cannot go. It is evident, therefore, that the appropriation in the case at bar continues to be available for the purpose for which it was made until the end of the first fiscal quarter after the adjournment of the legislature; and as the fiscal year commences on the first day of December of each year, and the legislature adjourned March 31st, 1887, the end of the fiscal quarter next after the adjournment of the legislature would be on August 31st, 1887. It is the duty, therefore, of the defendant to draw a warrant on the voucher set forth in the petition.

In the *Opinion of the Judges*, 5 Nebraska, 566, the question arose under Sec. 30, Art. 2 of the constitution of 1867, which provided that, "no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law; and no appropriations shall be made for a longer period than two years." The legislature of 1875 made appropriations for the "current expenses of the years 1875 and 1876," which included an appropriation for the normal school. On the 1st day of November, 1875, the present constitution took effect. The legislature of 1877 made an appropriation for the normal school, which included the quarter in which the session was held. As under the provisions of the constitution of 1867 no appropriation could be made to extend beyond

two years, it necessarily followed that the legislature of 1877 must provide for the payment of claims upon the treasury from the time the former appropriation ceased. The legislature of 1877 was the first that assembled under our present constitution, hence all appropriations prior to that time were made under the constitution of 1867. That case, therefore, has no bearing upon this.

Incidentally the question is raised as to the effect of the appropriation of funds which have been donated to the state for a particular purpose—such as the saline lands for the development of the salt springs of the state. Such funds having been received for a particular purpose and being held in trust by the state, it is claimed that a different rule applies than if they were derived from the ordinary revenues. The question is quite important, and does not properly arise in the case, and should not be decided without an opportunity being given all parties interested to be heard. That question, therefore, will not be considered. A peremptory writ of mandamus will issue as prayed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

THE STATE OF NEBRASKA, EX REL. RICHARD JAMES,
v. H. A. BABCOCK, AUDITOR OF PUBLIC ACCOUNTS.

1. **Constitutional Law:** CLAIMS AGAINST STATE. The constitution of the state requires that all claims upon the state treasury must be examined and adjusted by the auditor, and his action approved by the secretary of state before any warrant can be drawn therefor. This provision applies to all claims, whether claimed by virtue of a specific appropriation or not.

22	38
37	145
37	508
37	518
22	38
d10	892
d40	970
22	38
54	160

2. ———: LEGISLATIVE APPROPRIATIONS. The making of a specific appropriation by the legislature for the purpose of paying a demand against the state is, in no sense, the auditing of such claim, and the duties and responsibilities of the auditor and secretary of state with reference to the payment thereof are not diminished thereby.
3. ———: ———. The legislature has no authority under the constitution to audit or adjust a claim against the state, and if money is appropriated to pay an illegal claim or one which the state does not owe, and the auditor so finds upon examination and adjustment it is his duty to refuse to issue a warrant, notwithstanding such appropriation.
4. ———: ———: APPEAL FROM DECISION OF AUDITOR. The law furnishes an adequate remedy, by appeal from the decision of the auditor in the examination and adjustment of claims against the state. Therefore a mandamus will not issue to compel him to issue a warrant for the payment of a claim which has been disallowed by him upon such examination and adjustment.

ORIGINAL application for mandamus.

Richard F. James, pro se.

William Leese, Attorney General, for respondent.

REESE, J.

This is an application to this court, in the exercise of its original jurisdiction, for a writ of mandamus to compel the auditor of public accounts to audit a claim in favor of the relator, and issue his warrant upon the treasury therefor. The respondent demurred to the petition upon the ground that it did not state facts sufficient to constitute a cause of action.

In order that the exact point presented may be fully stated, we copy the petition, which is as follows:

"Your relator, Richard F. James, complaining of the respondent, says: That respondent is the duly qualified and acting auditor of public accounts of the state of Nebraska.

"That your relator having certain claims against the state of Nebraska for services performed by him, aggregating the amount as itemized by him in the sum of \$1,612.-63, presented said claim to the then auditor of public accounts on or about the day of, 1882.

"That the then auditor of public accounts refused to pay said claims, because there had been no appropriation made by the legislature therefor.

"That thereupon at the next ensuing session of the legislature of the state of Nebraska, to-wit, its session held in the year 1883, said relator presented the aforesaid claims to the legislature, with others.

"That said claims were considered by the committee on claims of said legislature, and upon a report by said committee, said legislature passed its certain act entitled, 'An act for the relief of Richard F. James, Diantha Latham, assignee, and others.'

"That said act was duly approved February 24, 1883.

"That the first section of said act recited as follows:

"SECTION 1. That the sum of six thousand eight hundred and twenty-four dollars and fourteen cents (\$6,824.-14) be and the same is hereby appropriated out of any moneys belonging to the state general fund not otherwise appropriated to pay outstanding indebtedness in the cases wherein the state of Nebraska prosecuted I. P. Olive and others for murder * * * * * itemized as follows:

"Richard F. James.....\$1323.68

"Diantha Latham, assignee..... 697.80'

"That thereupon, on the 26th day of May, 1883, the then auditor of public accounts, upon presentation of voucher, drew his warrant on the treasury in favor of Diantha Latham, assignee of Richard F. James, for the sum of \$697.30, appropriated as aforesaid to Diantha Latham.

"That thereafter, to-wit: On the 5th day of June, 1883,

there was presented to the then auditor of public accounts a voucher in words and figures following:

THE STATE OF NEBRASKA,

To RICHARD F. JAMES, Dr.

For amount appropriated by the 13th session of legislature as per act approved February 24th, 1883, being for expenses, etc., incurred, wherein the state prosecuted I. P. Olive and others, as per vouchers hereto attached:

Board, etc.....	\$ 388.00
“	27.40
Guard, etc.....	597.98
Miscellaneous.....	399.30
Services	200.00
	<hr/>
	\$1,612.68

“And that itemized accounts were attached to the said voucher, each for the sum named in said voucher, aggregating the sum of \$1,612.68.

“That the first two itemized accounts attached to said voucher for the sums of \$388.00 and \$27.40 are duplicates of accounts assigned to Diantha Latham by said Richard F. James, and were paid said Latham as a part of his said assigned claim of \$697.80.

“That the then auditor of public accounts, after deducting \$415.40, the amount before assigned and paid to Diantha Latham, and the further sum of \$46.90, errors in footing said accounts, then drew his warrant on the general fund for the sum of \$1,162.88 as balance found due by the then auditor of public accounts.

“That thereafter, to-wit: On or about the day of, 1887, said relator presented a certain voucher to the respondent, which is hereto attached and made a part of this petition, and requested him to audit said claim in the amount of \$160.80, and draw his warrant on the treasury for said balance due him.

“That said respondent refused, and still refuses so to do.

"That the money so appropriated is now in the treasury unexpended. Wherefore the relator prays a writ of mandamus," etc.

It thus appears that of the claim of \$1,612.68, originally presented to the auditor, there has been paid to Latham \$415.40, and that there was an error of \$46.90 in the footing—or addition—of the items; making a total of \$462.30 deducted by the auditor when he issued his warrant for \$1,162.88. These latter items added together make a total of \$1,625.18, or \$12.88 more than the original claim. But, by the act of the legislature referred to, the sum of \$1,323.68 was appropriated to the relator, and he has only drawn the \$1,162.88, which would leave due him the amount claimed, if the auditor is required to issue his warrant for the whole amount of the appropriation without any reference to the actual indebtedness.

The question presented is: Has the auditor the authority to investigate the original claim, ascertain the amount actually due, and issue his warrant therefor; or, is it his duty to issue the warrant for the amount appropriated, upon the theory that the claim has been "audited" by the legislature?

It is contended by the relator that the \$1,323.68 is specifically appropriated to him by the legislature, and that the duties of the auditor in issuing the warrant are ministerial only, and it is his duty to carry out the will of the law-making power as expressed in the act making the appropriation. This view of the case is supported by a number of cases cited in relator's brief, and were it not that, in our view, the constitution and law of this state have provided differently, we should consider them entitled to great weight in the decision of the question before us.

It is insisted by the attorney general that it is the duty of the auditor to "audit" *all* claims presented to him against the state, and the fact that a specific appropriation has been made to meet the demand cannot change his duty

or deprive him of his authority to investigate and pass upon the merits of the original claim. And he insists that this view is sustained by the language of the act by which the appropriation is made.

The act in question is found at page 370 of the Session Laws of 1883, and is as follows:

"Be it enacted by the Legislature of the State of Nebraska:

"Section 1. That the sum of six thousand eight hundred and twenty-four dollars and fourteen cents (\$6,824.14), be and the same is hereby appropriated out of any moneys belonging to the state general fund, not otherwise appropriated, to pay outstanding indebtedness in the cases wherein the state of Nebraska prosecuted I. P. Olive and others for murder, and William Lee with assault to murder, and Tip Laruc, John Kinney, Henry Horgreaves for the crime of murder, which said crimes were committed in the unorganized territory of the state of Nebraska, and attached to the fifth judicial district for judicial purposes, itemized as follows:

Richard F. James	\$1,323.68
Diantha Latham, assignee	697.80
* * *	* *

"SEC. 2. The auditor is hereby authorized to draw his warrants for the several amounts due to the parties named in this act."

By the first section the whole amount required is appropriated to pay "outstanding indebtedness," growing out of the prosecutions named, and by the second section the auditor is "authorized and directed to draw his warrant for the several amounts *due* to the parties named" in the act. This language would seem to indicate that it was the purpose of the legislature that this "outstanding indebtedness" should be paid to the parties holding the claims upon the ascertainment by the auditor of the amounts due to each of the parties named, but of course not in excess of the sum appropriated or set apart for the payment of each. We

think the only legal effect of the act is to give to the auditor the authority, which he did not before have, of issuing his warrant for the amount *due* to the parties for whose benefit the act was passed.

But we do not base our decision of the question alone upon the language of the act referred to. In fact, were the language otherwise our holding would be the same.

Section 9 of the article (IX.) of our state constitution, on "Revenue and Finance," provides that, "the legislature shall provide by law that all claims upon the treasury shall be examined and adjusted by the auditor and approved by the secretary of state before any warrant for the amount allowed shall be drawn; *Provided*, That a party aggrieved by the decision of the auditor and secretary of state may appeal to the district court."

This language clearly implies a limitation upon the power of the legislature in the matter of auditing claims against the state. The provision is imperative. The legislature *shall* provide that *all* claims upon the treasury "shall be examined and adjusted by the auditor and approved by the secretary of state" before any warrant shall be drawn or the money paid. These officers are, by the fundamental law of the state, made the examining board through whose hands all claims must pass, and it is not within the power of the legislature to change this tribunal. It cannot review the decision of these officers, for the section clearly points out the reviewing court. The party aggrieved may appeal to the district court. The fact that the appropriation is specific can have no weight whatever, for section 22 of article 3 of the constitution provides that, "no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law," etc. All appropriations of money from the treasury are specific, and "*all* claims upon the treasury *shall* be examined and adjusted by the auditor," etc. There is no distinction in appropriations. It is true that in the section

(22, Art. III.) above referred to, it is provided that, "no allowance shall be made for the incidental expenses of any state officer except the same be made by general appropriation," etc., but this provision can in no way change the fact that each appropriation contained in the *general* appropriation bill must be a specific appropriation for the purposes or offices named; and even then an account must be rendered "*specifying each item.*" Nothing could be more specific than such an appropriation. No warrant can be drawn except in pursuance of an appropriation, but the auditor may examine and adjust claims in the absence of such action by the legislature. While it is the duty of the legislature to see that no appropriations are made except for meritorious claims, yet such is the character of the safeguards thrown around the state treasury that such appropriation is by no means a final adjustment or auditing of the claim. It simply places so much of the funds in a position to be used by the auditor and secretary when the claim is examined and adjusted by the auditor, and his action is approved by the secretary. While the legislature may set apart money to pay a claim, it cannot pay it out nor order it to be done except in the manner provided by law. It has no jurisdiction to audit claims, and it is powerless to apply the money thereon without the *quasi* judicial concurrence of the officers named. If money is appropriated by that body to pay a claim, such action is not an adjudication upon its validity to such an extent as to relieve the auditor and secretary from responsibility, for their duties remain as fixed by the constitution. This construction of the constitution has been adopted by the legislature as well as by the supreme court in its former decisions.

Sections 1, 2, 3, and 4 of article VIII. of chapter 83, Compiled Statutes, are as follows:

"SECTION 1. All claims of whatever nature upon the treasury of this state, before any warrant shall be drawn

for the payment of the same, shall be examined and adjusted by the auditor of public accounts and approved by the secretary of state; *Provided, however,* That no warrant shall be drawn for any claim until an appropriation shall have been made therefor.

“SEC. 2. The auditor of public accounts shall keep a record of all claims presented to him for examination and adjustment, and shall thereon note the amount of such claim as shall be allowed or disallowed, and in case of the disallowance of all such claims, or any part thereof, the party aggrieved by the decision of the auditor and secretary of state may appeal therefrom to the district court of the county where the capital is located, within twenty days after receiving official notice. Such appeal may be taken in the manner provided by law in relation to appeals from county courts to such district courts, and shall be prosecuted to effect as in such cases; *Provided, however,* That the party taking such appeal shall give bond to the state of Nebraska in the sum of two hundred dollars, with sufficient surety, to be approved by the clerk of the court to which such appeal may be taken, conditioned to pay all costs which may accrue to the auditor of public accounts by reason of taking such appeal. No other bond shall be required.

“SEC. 3. In case the appeal shall be taken as provided in section two of this act, and on trial thereof, the district court shall be of the opinion that the decision of said officers was wrong, either in fact or law, the said court shall reverse the same, and by its order and mandate require the said auditor to issue a warrant, in accordance with the provisions of section one of this act, upon the treasury for such an amount as shall be determined on the trial of such appeal to be legally due thereon. If either party feel aggrieved by the said judgment the same may be reviewed in the supreme court as in other cases.

SEC. 4. No claim which has been once presented to such auditor and secretary of state and has been disallowed,

in whole or in part, shall ever again be presented to such officers, or in any manner acted upon by them, but shall be forever barred, unless an appeal shall have been taken, as provided in section two of this act."

These provisions were enacted in 1877 (See Session Laws 1877, 202), after the taking effect of our present constitution, and were evidently adopted for the purpose of conforming to its provisions.

In *State, ex rel. Squires, v. Wallich*, 14 Neb., 439, the present chief justice, writing the opinion of the court, in construing the section of the constitution above referred to, says: "Section 9, Art. IX., requires the legislature to provide that *all* claims upon the treasury shall be examined and *adjusted* by the auditor and approved by the secretary of state. * * * * Now suppose the legislature made an appropriation for the payment of articles to be donated to the members in addition to the compensation provided for in the constitution, could the auditor be compelled to draw his warrant for the articles so donated? That he could not will be readily seen, because by the act of drawing his warrant he in effect certified that the claim is authorized by law. The law imposes upon him the duty of examining claims and makes him responsible for warrants improperly drawn," etc.

We therefore hold that the auditor not only has the authority to examine and adjust all claims against the state; but that it is his duty to do so, when they are presented, and that if he finds the claim illegal or unjust, or that it has been paid, he should refuse to issue his warrant, and this obligation and his responsibility for his acts cannot be removed by the legislature. Also that the specific appropriation of money to pay a claim is in no sense the auditing of such demand within the provisions of the constitution.

As appears from the statute above quoted the right of appeal is given to a claimant whose claim has been disal-

lowed in whole or in part by the auditor. This right furnishes to such claimant a plain and adequate remedy in the due course of the law. By the statute a claimant whose claim has been disallowed, in whole or in part, is placed in the attitude of any other litigant against whom an adverse judgment has been rendered. He must appeal or the adjudication will be effectual. Section 646 of the civil code, referring to proceedings upon mandamus, is as follows:

"This writ may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law," etc. There being a plain and adequate remedy in this case, provided by law, it follows that a writ of mandamus cannot issue.

WRIT DENIED.

THE other judges concur.

THE STATE, EX REL. SIMEON CARTER, v. SCHOOL DISTRICT 49, SALINE COUNTY, WALLACE M. SHAVER, DIRECTOR, AND JAMES E. LENOX, MODERATOR.

School District: POWER OF OFFICERS. The duties devolved upon the members of the school district board, or upon the moderator and director, by section 8 of chapter 79, Comp. Stat., can only be performed by those two officers acting in conjunction. Any attempt on the part of either of them to perform such duties alone and without the joint action of the other, is ineffective and void.

ORIGINAL application for mandamus.

Daves, Foss & Stephens, for relator.

Abbott & Abbott, for respondent.

COBB, J.

This is an original application by Simeon Carter for a mandamus to issue against Wallace M. Shaver, director, and James E. Lenox, moderator of school district No. 49 of Saline county, commanding them to recognize the relator as the treasurer of said school district, and commanding the said Wallace M. Shaver, as director, to draw and sign a warrant upon the county treasurer of Saline county in favor of the relator as treasurer for all moneys in the county treasury, raised for district purposes or apportioned to said district by the county superintendent, present the same to the moderator to be countersigned by him, and when so countersigned deliver the same to the relator.

The relator filed his petition in this court, alleging that he was duly elected treasurer of said district in the year 1884, for the term of three years; that he duly qualified as such treasurer, giving an official bond which was duly approved; that on the 5th day of July, 1886, the director and moderator of said school district notified relator that they should require him to give a new bond in the sum of \$1,500 to more fully protect the interests of said district on account of money which would come into his hands as treasurer of said school district. That upon receiving said notice he made a new bond in the sum of \$1,500 to said district, which he himself signed as principal and had two good and sufficient sureties sign the same, one of which qualified in the sum of one thousand dollars, and the other in the sum of five hundred dollars, etc. That said bond was duly executed, signed, and justified by said principal and sureties within the ten days required by law therefor, after the receipt of the said notice. That on the 13th day of July, 1886, relator took said bond and handed the same to James Lenox, the moderator, who, after reading the same replied to relator that said bond was good and sufficient and that he approved it, and that he being then in the

field, had neither pen nor ink, would put his approval thereon as soon as he could, and afterwards, either on the 17th or 19th day of the same month, he, in due form, did put his approval on said bond in writing. That at the same time relator handed the said bond to said moderator he, the said moderator, after looking the same over, handed it to Wallace M. Shaver, the director of said district, who thereupon took the bond and placed it in his pocket, and said that he would see. That the relator did not see or hear of the said Wallace M. Shaver afterwards until the 17th day of said July, when said Shaver came to relator and tendered him back the said bond, and said "I shall not approve it." That the moderator and director of said school district never had or held any meeting or took any action upon said bond other than is set forth in said petition; that at no time did they declare the office of said treasurer vacant nor ever have declared the office vacant. That afterward, to-wit, on the 21st day of said month of July, there was signed and handed to said director, Wallace M. Shaver, a petition for a school district meeting to elect a successor to Simeon Carter; that thereupon the director, Wallace M. Shaver, called a school district meeting to elect a successor to Simeon Carter; that this was done without any connection whatever with the moderator, James E. Lenox.

The said relator also alleged in and by his said petition that at the said meeting called by the said Wallace M. Shaver, as aforesaid, the voters then present selected Philip J. Gossard to fill the vacancy which they supposed existed in the office of treasurer of said district. That relator is the legal treasurer of said district, and that said Philip J. Gossard is, and has been since the time of said meeting, trying to fill the said office without authority of law. That there is and at all times has been money in the county treasury of Saline county belonging to the said school district, and which relator as treasurer of said school district

could draw from said county treasury if he had a warrant or order therefor drawn by the director and countersigned by the moderator of said district. That relator has demanded of the said director that he draw a warrant upon the county treasurer of Saline county for all moneys in the treasury of said county belonging to said school district, in favor of relator as treasurer of said district, which said director has refused to do.

There are many other allegations in said petition, but the above are all which it is deemed necessary to set out in this opinion.

The defendant, Wallace M. Shaver, made and filed his answer to the said petition, denying many of the allegations of the same, but by affirmative allegation alleging that he, as director, declared the said office of treasurer of said district vacant, and called the meeting of the said district for the purpose of filling said vacancy, at which meeting P. J. Gossard was elected. He also attached to his said answer a copy of the call for said special meeting, whereby it appears that said special meeting was called by him as director alone and without the concurrence of the moderator.

The cause was referred to a referee to take testimony, etc.

The report of the referee contains the testimony of the parties and sundry witnesses on either side, giving evidence upon most of the matters contained in the petition as well as the answer. But in my view the points which must be conclusive of the case stand admitted in the answer, and scarcely needed any evidence. That is, that there was never any action of the school district board, either declaring a vacancy to exist in the office of treasurer of the district, or calling a special district meeting to elect a treasurer to fill a vacancy. The following is the provision of statute applicable to such cases ;

"Sec. 8. Whenever, by the failure of his sureties or otherwise, the official bond of the district treasurer becomes, in the opinion of the other members of the board, insuffi-

cient to protect the district from loss, it shall be the duty of the director and moderator to demand additional security or a new bond of the treasurer. If the treasurer refuse or neglect to procure a satisfactory bond, and present it to the other members for approval within ten days after said demand, the said moderator and director may declare his office vacant, and proceed to call a district meeting to elect a new treasurer to fill the unexpired term." C. S., Ch. 79.

From the language of this provision it is quite clear that it requires the official act of the board, that is of the two disinterested members, in session as a board, to declare the office of the district treasurer to be vacant.

It appearing, as well by the pleadings as by the evidence, that such action was not had by the director and moderator acting together as a board, but that all that was done or claimed to be done was by the director alone, and as to some extent appears, against the known views and opinion of the moderator, it necessarily follows that no vacancy existed, but that the relator remained and is the legal treasurer of said school district.

It also appears by evidence and stipulation that there now is in the treasury of Saline county moneys belonging to said school district. This money it is the right and duty of the relator to draw and hold, and in a proper case disburse on account of said district, but this he cannot do without a warrant therefor drawn by the director and countersigned by the moderator. Such warrant the said director has refused to sign and deliver to the relator. He is, therefore, in default of a legal duty which may be enforced by mandamus.

A peremptory mandamus will, therefore, issue to the said Wallace M. Shaver, director of school district 49 of Saline county, commanding him that he forthwith draw up in the usual form, and officially sign, an order or warrant upon the county treasurer of Saline county in favor of Simeon Carter, treasurer of said district, now in said

treasury, collected on account of, or apportioned to said district by the county superintendent; that he present such order or warrant to the moderator of said district to be countersigned by him, and when so countersigned, that he forthwith deliver the same to the relator.

The said James E. Lenox, moderator, not being in default of any duty, the cause is, as to him, dismissed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

22	58
34	412
22	53
40	227

THE SANDWICH MANUFACTURING COMPANY, PLAINTIFF IN ERROR, v. GEORGE E. FEARY AND RUFUS B. FEARY, DEFENDANTS IN ERROR.

1. The evidence examined, and *Held*, Not sufficient to sustain the verdict.
2. A verdict so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through mistake, or some means not apparent in the record, will be set aside and a new trial awarded.

ERROR to the district court for Seward county. Tried below before NORVAL, J.

Leese Brothers and *R. S. Norval*, for plaintiff in error.

D. C. McKillip and *R. P. Anderson*, for defendants in error.

COBB, J.

This action was commenced in the district court of Seward county, by the plaintiff against the defendants, for the agreed price of two Sandwich Reliance Harvesters and

Appleby Binders, which it alleged had been ordered of it by the defendants to be paid for when the said machines had been tested and found to do good work, and which it also alleged had been delivered, and that the plaintiff had performed all of the conditions of the said order, etc. I copy the answer of the defendants at length.

"First defense: They admit the execution and delivery of the order set forth in the petition, and deny each and every other allegation in petition.

"Second defense: Said order in petition referred to was given upon the therein expressed condition, and it was by its terms agreed and understood between the parties that the purchase of said harvesters and binders should not be considered absolute, and that the sum of \$480 should in nowise be due and payable until said machines had been fully tested and found to do good work. That the machines have by defendants been fully and faithfully tried and tested by actual trial in the field, and that said machines have wholly failed to work or to serve for the purpose of cutting and harvesting grain; and that these defendants have been wholly unable to cause said machines to work, or to use or operate the same for the purpose aforesaid, by reason of which the said machines are wholly worthless, and of no value whatever to the defendants.

"Third defense: On the 25th of June, 1883, as an express condition of the sale of said machines, and in consideration of giving said written order, and as a part of the same agreement and transaction, plaintiff made, executed, and delivered to defendants, its certain written warranty of said machines and binders. *Said written warranty is attached hereto, marked exhibit "A," and made a part of this answer.*

"That by the terms of said warranty, plaintiff fully warranted each of said machines to be well made, of good material, and durable, with proper care, and to be capable of cutting from twelve to eighteen acres per day; and if

upon starting said machines they should in any way prove defective, or fail to work, said plaintiff agrees, upon notice of said failure, to put said machines in order, and to replace any defective part, and that if then the said machines could not be made to work, the same shall be returned by the purchaser, free of charge, to the place where received, and the payment of money or notes refunded, thereby ending all further responsibility on the part of either party.

"The said machines are not well made nor of good material, and are not durable, and are not capable of cutting from twelve to eighteen acres per day; and after having been fully and faithfully tested and tried by these defendants, proved defective, and wholly failed to work or to serve for the purpose of cutting and harvesting grain, of which failure and defects defendants duly notified and advised the plaintiffs. Defendants, according to the written warranty, returned said machines to plaintiff, and have fully performed all their duties under the warranty. Plaintiff failed, neglected, and refused, although often requested, to put said machines in order, or to refund the payment of the said sum of \$480, or to perform any of their duties under the warranty."

"EXHIBIT "A," MADE PART OF ANSWER.

WARRANTY TO BE GIVEN TO PURCHASER.

"The Sandwich Harvester machines are warranted to be made of good material, and durable, with proper care. The reaper and mower is warranted to be capable of cutting an acre of grain or grass per hour with one team. The Sandwich harvester and binder is warranted capable of cutting and binding, in a workmanlike manner, from twelve to eighteen acres per day, with sufficient team. *If upon starting the machine it should in any way prove defective, or fail to work, the purchaser shall give prompt written notice to the agent from whom he purchased it, and allow sufficient time for a person to be sent to put it in order, and the defective*

part, if any, replaced. (*The purchaser rendering necessary and friendly assistance.*) If then it cannot be made to work, the machine shall be returned by the purchaser free of charge to the place where received, and the payment of money or notes will be refunded, ending all further responsibility on the part of either. Continued possession of the machine, or failure to give notice as above shall be deemed conclusive evidence that the machine fills the warranty.

“SANDWICH M’F’G CO.

“*Sandwich, III.*”

To this answer there was a reply by the plaintiff denying the facts therein stated, except as to the giving of the warranty therein set out, which it admitted.

There was a trial to a jury, with a verdict and judgment for the defendants. The plaintiff brings the cause to this court on error. In the petition the following errors are assigned :

“1. The verdict of the jury is not sustained by the evidence.

“2. The verdict of the jury is contrary to law.

“3. The court erred in overruling the motion for a new trial.

“4. The court erred in allowing the defendant, George E. Feary, to testify as to what he did, over the objection of the plaintiff.

“5. The court erred in sustaining the objections of the defendants and excluding the testimony of the defendants when asked the following question : Do you know that the machine is not capable of doing good work just as the warranty says?

“6. The court erred in sustaining the objection of the defendants and excluding from the jury the offer of plaintiff to prove that the machine would in all respects comply with the conditions of the contract if the defendants had complied with their part of the contract.

"7. The court erred in excluding from the jury the statements made by the defendants to the witness, G. Babson, Jr., on page 97."

It is not deemed necessary to take up or discuss these assignments in detail, in order to reach what I think to be the controlling point in the case. An examination of the pleadings and evidence leaves no doubt of the purchase by the defendants from the plaintiff of two Sandwich harvester and binder machines for the sum of four hundred and eighty dollars for the two; that they were sold and delivered to and received by the defendants upon an express written warranty, and were promptly returned by them upon the ground that they did not, upon trial, comply with the terms of the warranty, and that the agent of the plaintiff refused to receive the machines, when so returned, on the ground that the terms and conditions of the warranty had not been complied with on the part of the defendants, in respect to giving the notice therein provided for, and allowing sufficient time for a person to be sent to put the machine in order and replace the alleged defective part, etc.

There is some conflict in the evidence bearing upon the above points of the case, but as the jury found for the defendants, their evidence, where there is a conflict between it and that of the plaintiff, must be deemed to be true, and form the basis of our consideration.

It appears from the testimony of George E. Feary, one of the defendants, and as to this there is no conflict, that on the 7th day of July he took one of the machines to his place. It appears that at or about the same time, the other machine was also taken to the farm of the other defendant. This was Saturday. On Monday morning, the 9th day of July, pursuant to an agreement between witness and plaintiff, two men, or, as witness calls them, "boys," Cummins and Neihardt, came to witness's place to assist him in setting up and starting the machine. I

quote from his testimony: "In the morning I opened the box and commenced to set the machine up, and after the boys came we went to work. There were three of us to work on it till noon. I got my hired man to assist. We were in the field by half-past 3 or 4 o'clock, and all of us were present when the machine was tested, myself, my hired man, young Cummins, and Dan. Neihardt, and we put the machine in a piece of barley of 15 acres, and went three times around it. We were from half-past three until very near sundown trying that machine. We would go a little ways and try to adjust it, and go a little ways again, and adjust reel and butter board, and failed to make it work."

* * * * *

Q. Tell, as near as you can, wherein the machine seemed to fail to work?

A. In the first place, it did not elevate it well. The grain came up endways. In the second place, this butt board, as they call it, they could not adjust it so it put the grain to the binder. It would run up between the butt board and the grain reel. It did not seem to get the grain to its place.

Q. State what kind of work the machine did there?

A. If you allow me to judge, it did very poor work.

Q. In what respect?

A. It did not bind very well. Most or quite a number of bundles run out between the butt board and the grain reel and did not catch it at all.

Q. By a juror. Was the barley very short?

A. In some places it was pretty tolerable short, and in some places it was not. It was more than 18 inches high, the shortest of it.

* * * * *

"Mr. Cummins and Neihardt claimed to me that the barley was too green was the reason why it was not elevating it well. They insisted on coming back and trying it

again, and I told them I did not think it was worth while, if they claimed they could not adjust the machine and make it do good work, and I told them if it did not do good work I did not want the machine, that I could not buy a machine and pay that price for it if it failed to work. They claimed to me that they wanted to come back by Thursday morning, as they thought by that time the grain would be ripe enough, and I finally gave them the privilege to come back and try it Thursday morning. I did tell them that."

Q. Did you tell them you did think it would not work?

A. I did tell them, this butt board I did not think could be made to do good work, but I did consent for them to come back if they wanted to.

* * * * *

Q. Did you send any word to Mr. Babson by these men?

A. I did, verbally.

* * * * *

Q. I will ask if you tried to work this machine after Monday?

A. We did.

Q. When?

A. On Wednesday.

Q. State to the jury what you did then?

A. We tried cutting grain.

Q. What success did you have?

A. No better than we had on Monday. We went twice round the same field on Wednesday, myself and the hired man.

Q. How long did you work at it?

A. We hitched up in the morning and I think we worked at it until about 11 o'clock.

Q. And it did no good?

A. It did not do any good.

Q. State how it worked in cutting grain, how it cut it, and how it worked, as near as you can.

A. As far as cutting is concerned, it cut it off, but it would not elevate it and bind it. It would come up end-ways and go right out between the butt board and binder.

Q. What portion of the grain would be put off in that condition?

A. I don't know, there was considerable of it. I do not know as I could say correctly just how much did go to waste, but there was a good deal of grain would go to waste.

Q. That was on Tuesday, the 10th, was it?

A. That was on Wednesday.

* * * * *

Q. I will ask you whether or not you came to Seward on that Wednesday?

A. I did.

Q. What time in the day did you come?

A. I judge it was about 6 o'clock.

Q. What did you come to town for?

A. I came to see Mr. Babson.

Q. Did you see him?

A. I did.

Q. State to the jury what took place between you and Mr. Babson.

A. I went over to Mr. Babson's place of business and he was not there, and I went up to his house and called for him and he came out. I told him them machines failed to do good work, and I asked him if the boys had told him on Monday evening about the work of the machine, and he said they did. I says, Mr. Babson, I do not want the machine unless it does good work and the boys started it, and it would not work and I consented to give it another trial Thursday morning, and I asked if they were going to come and he says, "I will be there bright and early Thursday morning and bring men." I believe that was all that was said at that time.

* * * * *

Q. You have heard the testimony of Mr. Reynolds in regard to the conversation at Staplehurst.

A. Yes, sir.

Q. State to the jury briefly what took place between you and Mr. Reynolds at Staplehurst.

A. They came to Staplehurst along about four o'clock in the evening, it might have been a little later than that, it might have been half-past four, and Mr. Reynolds wanted to know if I would not go back with him and test the machines and give him another trial, but I refused to go in the first place and told him that my grain was getting ripe and was wasting and that I would have to do something to get it saved. Mr. Reynolds claimed to me that he would be responsible for my time, and if the grain wasted he would be responsible for it, and I told him like this, I considered him the same as all these machine agents, his responsibility did not amount to anything. That is what I told him, that I didn't think he was worth half the crop there was on my place, and I would not go back with him on those terms.

Q. You say that the understanding with the agent, Babson, was he would be there or have a man there with him on Thursday morning bright and early. How long did you wait for him to come on Thursday?

A. We waited there with dinner until one o'clock, we had dinner prepared there for these men if they came, and it was one o'clock when we set down to the table to eat our dinner. After we ate our dinner we went to Staplehurst. It was half-past one or two o'clock when we started.

Q. Did you have your hands there?

A. Yes, sir, I had men there ready to shock, provided we cut any.

* * * * *

Q. I will ask you what you have done with the machines?

A. I delivered them.

Q. Where, at Mr. Babson's, or at his place in this town, according to the written agreement?

A. Yes, sir.

Q. When did you do it?

A. I delivered the first on the 13th day of July.

Q. That would be on what day?

A. That would be on Friday.

Q. That was the machine that was taken to your farm, was it?

A. No, sir, that was the machine that was at my brother's.

Q. You delivered that on the 13th of July?

A. I delivered that one on the 13th day of July.

Q. Did you deliver it personally or by some one else?

A. Personally.

Q. To whom did you deliver it?

A. To Mr. Babson.

Q. In person?

A. Yes, sir.

Q. What was said and done at that time, when you delivered the machine to Mr. Babson?

A. In the first place he refused to receive the machine and I drove up there and unloaded in his yard, and after I had unloaded the machine, he wanted to exchange a Walter A. Woods in preference to it or he wanted me to take a Walter A. Woods machine and try it.

Q. In exchange for the other one?

A. Yes, sir.

Q. Do you know where the machines are?

A. The last time I was along there I saw them lying there by Mr. Babson's, a day or two ago. I suppose they are the same machines, but I would not swear to that. They are the same make, though, I think."

There was uncontradicted evidence on the part of the plaintiff that the first notice received by the agent of the

plaintiff who sold the machines, that upon starting the machines, or either of them, in grain proper to be harvested, they had proved defective or failed to work, was late in the evening of Wednesday. That at that time James, an expert in the use and handling of reaping machines, in the employment of the plaintiff in testing and rectifying machines sold by plaintiff, was at, or in the neighborhood of, Ulysses, a neighboring town; that Babson, the agent, immediately upon the close of the interview between him and defendant, G. E. Feary, as testified to by him, went to the depot to telegraph to Ulysses for the purpose of bringing said James, the expert, to Seward for the purpose of putting the machines in controversy in order, but was unable to establish telegraphic communication with that place. That the agent thereupon engaged a team for four o'clock the following morning to drive to Ulysses with the object of procuring the said expert for the purpose aforesaid. That Babson was at the stable very early in the morning before the stable keeper was up. That as soon as he could get the team he started and drove to Ulysses, arriving there about half-past six o'clock Thursday morning. That he then found that Mr. James was at the farm of Mr. Cook, about ten miles west of Ulysses. That Babson then procured a fresh team with a driver and sent the same to Mr. Cook's for James, and had him brought to Ulysses by about 11 o'clock A.M. That at this time Babson became sick of cholera morbus, and, being unable to travel, procured Mr. Reynolds, a machine man of Ulysses, to accompany Mr. James to the farm of defendant for the purpose of testing and rectifying the said machine. That after partaking of an early and hasty dinner, as early as 12 o'clock M., they started and arrived at the house of the defendant, G. E. Feary, according to the plaintiff's witnesses, between 12 M. and 1 P.M., but according to the testimony of defendant it could not have been so early. But in my view the difference is not material. Upon arriving at the house of

defendant, James and Reynolds were informed that G. E. Feary had gone to Staplehurst for the purpose of hauling out some machinery. That James and Reynolds then followed him to Staplehurst, arriving there not to exceed five minutes behind him. They found him at the place where reaping machines were kept for sale, but before he had made any arrangements for another machine they made known to him the purpose for which they had come to his farm and requested him to return with them to his farm and allow them to test and put the machine in order, and declared their ability to make it do good work. That this he refused to do, but forbade their going on to his place for any other purpose than to take the machine away.

It will be seen by reference to the written warranty set up in the answer, a copy of which is set out at length, as an exhibit by the defendants, that it was a condition of said warranty that, "If upon starting the machine it should in any way prove defective or fail to work, the purchaser shall give prompt written notice to the agent from whom he purchased it, and allow sufficient time for a person to be sent to put it in order, and the defective part, if any, replaced (the purchaser rendering necessary and friendly assistance)." Now, it is not contended, nor can it be, that the written notice above contemplated was given so as to avail the defendants in the case, although it was drawn out upon the cross-examination of one of the defendants when on the stand as a witness, that some kind of a notice was mailed to plaintiff's agent within a few minutes of the time when plaintiff's experts applied to the defendant at Staplehurst for permission to test and put in order the machine claimed to have been started and found defective. But defendants contend that plaintiff, through its agent, waived the giving of written notice. This I think it did, but when, and how? Upon the answer to these questions I think the case turns. Was it waived by sendings Cummins and Niehardt to assist defendant to set up

the machine? Certainly the plaintiff was under no obligation to assist the defendants in setting up or testing the machines, until they were found or claimed by the defendants to be defective, and that it did so can only be attributed to a desire on its part, or that of its agent, to cultivate the good-will and friendship of its customers. These men, or boys, as the defendants call them, were not experts nor claimed to be such, yet being employed about the warehouse where the machines were kept might be reasonably supposed to be more handy in putting the different parts of a machine together than the majority of the purchasers of such machines. When they were sent to the farm of defendant the machine in question was believed by all parties concerned to be perfect of its kind; it was contemplated that upon its trial it might prove defective, or even if not materially defective the purchaser might claim that it was. Could the act of sending them to assist in putting the machine together be construed into a waiver of notice of any defect in it which might thereafter be developed in fact or claimed by the purchaser? I think not. It will not be contended that these men were agents of the plaintiff upon whom notice to it could have been served, or whose knowledge of any fact could be brought home to it as its knowledge. And yet, having been sent by the agent of the plaintiff to assist the defendants to set up the machine, had they, by their negligence or want of skill, broken or injured the machine, the plaintiff, upon well-known principles of law, would have been liable for the injury occasioned thereby.

There is nothing in the evidence to the effect that the defendants notified Babson, the plaintiff's agent, through Cummins and Neihardt, or either of them, that upon starting the machine it had proved defective, or failed to work. It is evident from the testimony of the defendant, G. E. Feary, that he did not consider the trial of the machine in the presence of Cummins and Neihardt as conclu-

sive or satisfactory, because in his testimony he stated that on the Wednesday following he again tried cutting grain with the machine. That he hitched up in the morning and worked with the machine until eleven o'clock. About six o'clock in the evening of that day defendant went to Seward and verbally notified Babson that the machine failed to do good work. Up to this point of time, there can be no doubt, as I view the law, that the plaintiff was entitled to written notice. At this time verbal notice was given to the agent. Plaintiff had the option to stand upon its right under the terms of the warranty to notice in writing, or to waive it. Counsel for defendants in the brief claim that plaintiff waived the written notice by acting on this verbal one. In this I agree with them. But when and how? On Thursday, July 12th, by sending a person to put the machine in order. This was the only act of plaintiff's agent in reference to the machines, between the date of their delivery to the defendants and their return, and it will be claimed by no one that between this waiver and the return of the machines by the defendants there was allowed sufficient time to put the machine in order and replace any defective part, or that the defendants offered to render friendly assistance for such purpose. But on the contrary, it is stated by the principal defendant in his testimony that upon the completion of the act on the part of defendant, which as we have seen constituted a waiver of the written notice, he forbade the person sent by plaintiff to go upon his premises, except for the purpose of taking the machine away.

But it must be admitted that it is the logic of defendants' contention, though not so claimed in the brief, that the plaintiff waived the written notice on the evening of Wednesday, July 11th, by the promise of its agent to "be on hand bright and early Thursday morning" to put the machine in order. I know of no case, and certainly none is cited by counsel, which holds that a promise to act upon

a verbal notice amounts to a waiver of a written one, yet I think it would in a case where such promise is made in bad faith. But there is no evidence of bad faith here. On the contrary, the agent used extraordinary exertion and diligence to procure a competent person to put the machine in proper order.

The language of the contract of warranty is, the defendants should "allow sufficient time for a person to be sent to put it in order," etc., after the giving the notice. The word *sufficient*, as here used, means reasonable, a reasonable time under the circumstances, which must have been within the contemplation of both parties when entering into the contract. While it must have been within the contemplation of the parties that the plaintiff would have one or more persons competent to put the machine in order in their employ, or accessible to them somewhere within the radius of the operations of the Seward agency and business, it cannot reasonably be supposed to have been within their contemplation that it would have in its employ an expert machinist to every machine, waiting the result of its trial by the purchaser. So that, in my opinion, this sufficient time must be construed to mean a reasonably sufficient time to call in from the country, wherever he might reasonably be expected to be engaged in similar work, the person or one of the persons employed by the plaintiff company for such service, and send him to the farm of the defendant. Now then, upon the theory which we are now considering, and taking the view of the case most favorable to the defendants possible upon the evidence, which it must be admitted it is our duty to do, were the jury warranted in finding that later than half-past one or two o'clock of the day following that on which the verbal notice was given at about six o'clock in the evening, was more than a sufficient or reasonable time to give for the purpose contemplated? I think not. In coming to this conclusion I by no means forget that the jury is the judge

of what is reasonable or necessary upon the facts in every case, nor do I forget what has been so often declared here, that a verdict will be sustained unless clearly wrong. So that in coming to the conclusion that there must be a new trial in this case, I do so upon the ground that the verdict is clearly wrong, and must have been found through mistake or some means not apparent in the record.

The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

THE other judges concur.

THE STATE BANK OF NEBRASKA, PLAINTIFF IN ERROR,
v. D. S. LOWE, DEFENDANT IN ERROR.

Lien on Live Stock: STATUTORY CONSTRUCTION. The act of the council and house of representatives of the late territory of Nebraska, entitled "An act to provide for liens upon live stock for their keeping," approved February 18, 1867, examined, and *Held*, Not to give a lien upon live stock for their keeping superior to the lien of a previously executed, delivered, and recorded mortgage thereon.

ERROR to the district court for Saline county. Tried below before MORRIS, J.

Dawes, Foss & Stephens, for plaintiff in error, cited: *Kingsbury v. Smith*, 13 New Hamp., 109. *Hyde v. Noble*, 13 Id., 494. *Farley v. Lincoln*, 51 Id., 580.

Hastings & McGintie, for defendant in error, cited: *Case v. Lane*, 21 Kan., 217.

COBB, J.

This cause comes up on error from the district court of Saline county. The cause was tried to the court without the intervention of a jury, upon a stipulation of facts which I here copy at length :

"It is hereby stipulated and agreed that the following are the facts in this case:

"1st. That the plaintiff is incorporated under the laws of Nebraska as the State Bank of Nebraska, at Crete, Neb.

"2d. That on the 23d day of May, 1883, one F. A. Griswold was the owner of the property in controversy in this case, viz.: One large red cow, seven yearling heifers of the value of \$195, and that on said 23d day of May, 1883, among other things said F. A. Griswold gave to plaintiff a chattel mortgage on said animals to secure the sum of \$700. A true copy of said mortgage is hereto attached, marked 'A.' That said sum has long been due and has not been paid.

"3d. That on the 4th day of December, 1883, without the knowledge of plaintiff, said Griswold placed the same identical property in controversy in this case, in the hands of defendant for care and keeping during the ensuing winter, and that said defendant took all of said animals on said 4th day of December, 1882, and kept, fed, watered, and cared for all of said animals from said 4th day of December, 1883, until the 15th day of April, 1884, at the stipulated and agreed price of \$40. That said sum has not been paid nor any part thereof, nor has the same nor any part thereof been tendered to this defendant.

"4th. That on the 5th day of April, A.D. 1884, and before this action was commenced, plaintiff demanded the possession of said animals in controversy herein, which defendant refused, and that said plaintiff under and by virtue of the said chattel mortgage heretofore mentioned, replevied the said animals, and that said defendant refused to

deliver up the possession of said animals for the reason that he claimed a lien upon said stock for his care and keeping, sheltering, feeding, and watering the same.

"5th. That there is due said defendant for the care and keeping of said animals the sum of \$40 and interest thereon from April 15th, 1884.

"6th. That said defendant had no actual knowledge of the existence of said chattel mortgage until the 15th day of April, 1884, but said plaintiff filed said chattel mortgage in the office of the county clerk of Saline county, Nebraska, on the 23d day of May, 1883, and the same was duly filed and indexed by him in manner provided by law.

"None of said stock in controversy herein was out of the custody and possession of this defendant from the time they were so received by him for care and keeping on the 4th day of December, 1883, until they were taken from his possession by the officer under the writ of replevin which was issued in this case."

The finding and judgment of the district court were for the defendant. I adopt the language of counsel for defendant in error in saying that, "The question, and only question presented, is whether an agister's lien for feeding and wintering live stock is paramount to the lien of a prior chattel mortgage thereon." The answer to this question must depend upon the construction of the provisions of our statute applicable thereto.

The provision of our statute which it is claimed gives a lien to the agister of cattle is found on page 57, Comp. St. (Ch. 4, Sec. 28), and is in the following words:

"SECTION 28. When any person shall procure, contract with, or hire any person to feed and take care of any kind of live stock, it shall be unlawful for him to gain possession of the same by writ of replevin or other legal process until he has paid or tendered the contract price or a reasonable compensation for taking care of the same."

Although this statute has been in force since 1867, it

never has been construed by this court, and as I am unable to find that a similar one exists in any of the sister states, I conclude that its language has not been construed by the courts of any state. It cannot fail of observation that the word "lien" does not occur in the body of the act. I use the word act purposely, because while in the current compilation it constitutes section 28 of the chapter entitled "Animals," it was passed as an entire statute of one section. At the date of its passage, so far as I am able to ascertain, there was no provision of law in force in either of the states of Ohio, Illinois, Iowa, Missouri, Minnesota, Kansas, Texas, or California, giving the agister of cattle a lien on the animals agisted, nor was there any such statute in force in the state of Michigan, if we except an apparent recognition in the general lien law of 1846, of an agister's lien at common law. Ours was then probably the first western state or territory to recognize the necessity of providing some measure of protection to the herders and feeders of cattle against the reclamation of such stock by the owners without paying for their keeping. But our legislature seems to have proceeded with great caution; and instead of adopting the language of the statutes of New Hampshire and other eastern states, which gave a lien in express terms to the agisters of cattle, they only created an estoppel against the person contracting, hiring, or procuring the feeding and caring for of live stock to gain possession of such stock by replevin or other legal means, until he should make payments or tender the same therefor. They might have followed the language of any of the said statutes and thereby adopted the construction placed upon the same by the courts. As they did not do it, but used more limited terms, it is but fair to presume that they intended to avoid a repetition of the litigation which had originated under them.

In the case at bar, Griswold, the mortgagor, having contracted with the defendant in error to feed and care for the

cattle in question, was estopped to reclaim them until he had paid or tendered the pay therefor. Such estoppel will include the plaintiff in error if it was in privity with him in such contract. Had the mortgage been executed after the contract for the agisting of the cattle, and while they were in the possession of the agister, then doubtless the mortgagee's rights would have been subject to those of the agister, and such would probably be the case had the mortgage, although executed and delivered, remained unfiled and unrecorded at the date of the agisting contract. But clearly the relation of mortgagor and mortgagee confers no power upon the former to bind or estop the latter as privy, by a subsequent contract made without his consent or knowledge.

But to consider the case in a more practical point of view; let us suppose that the plaintiff in error had yielded to the claim of the defendant in error and paid him the sum demanded for the agisting of the cattle, how could it have reimbursed itself of the money so paid, even had there been a surplus of the proceeds of the sale of the cattle upon foreclosure of the mortgage? The terms of the mortgage, as set out in the records, authorized the mortgagee, in case of default in the payment of the debt secured by the mortgage, to take possession of the mortgaged property "to sell the same at public auction, or so much thereof as shall be sufficient to pay the amount due, or to become due, as the case may be, with all reasonable costs pertaining to the taking, keeping, advertising and selling of said property. The money remaining after paying said sums, if any, to be paid on demand to the said party of the first part." The word "keeping" as used in the above quoted clause of the mortgage, evidently means the keeping of the property after the taking and pending the advertising before sale. When the subject of the mortgage consists of inanimate chattels it includes storage, and, in many cases, insurance; but I never knew of a case where it was held

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to include the expense of keeping while the mortgaged property remained in the possession, real or constructive, of the mortgagor. I accordingly come to the conclusion that had the plaintiff in error paid the demand of the defendant, it would have been a voluntary payment which could not have been allowed to him, as "costs pertaining to the taking, keeping, advertising, and selling of said property," and for which it would probably have had no legal cause of action against the mortgagor.

The provisions of our statute differ so widely from those of the statute of New Hampshire under which the cases cited from the reports of that state by counsel for plaintiff in error were decided, and from those of the subsequently enacted statute of Kansas, under which the able opinion by Judge Brewer, cited by counsel for defendant, was written, that I deem it impossible to follow the argument of either of those cases in the disposition of this. They will, therefore, not be commented upon.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

OLIVER C. ASPINWALL, PLAINTIFF IN ERROR, V.
ROBERT W. SABIN, DEFENDANT IN ERROR.

1. **Jurisdiction: PRESUMPTION.** It is a rule of law that every presumption is in favor of the correctness of the decision of courts of general jurisdiction until the contrary is made to appear. *Bedford v. Ruby*, 17 Neb., 97.
2. **Bills of Exceptions** should contain all the evidence considered by a court in the trial of a cause. If not, it must be presumed that the findings of the trial court on questions of fact are correct.

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22	78
44	6
22	73
49	564
50	313

3. **Divorce and Alimony: ATTORNEY FEES: LIEN.** Where, in an action for divorce and alimony, an order is made by the court in which the cause is pending, requiring a sum of money to be paid into court as and for attorney's fees, and afterwards the parties to the action, by collusion and fraud and for the purpose of defrauding the attorney for plaintiff out of the allowance made for his compensation, with notice of an attorney's lien thereon in his favor, enter into an alleged settlement by which the cause is to be dismissed and the order for alimony satisfied, such fraudulent settlement will be set aside, on motion of the attorney entitled to the money, and the amount found due ordered to be paid into court by the defendant.
4. ——— : ——— : ——— : **PARTIES.** In such case, where no relief is sought as against the original plaintiff and her rights are to be affected in no way, she is not a necessary party to the motion, and no notice upon her of the pendency thereof is necessary.

ERROR to the district court for Gage county. Tried below before BROADY, J.

L. W. Colby and *R. S. Bibb*, for plaintiff in error.

Griggs & Rinaker and *R. W. Sabin (pro se)*, for defendant in error.

REESE, J.

On the 7th day of February, 1885, Lena Aspinwall instituted her action in the district court of Gage county against Oliver C. Aspinwall, in which she prayed for a divorce and alimony. During the progress of the case proceedings were had which resulted in an order being made by the court allowing her \$50 per month for the maintenance of herself and child, and \$300, to be paid in three equal installments, for attorney's fees and expenses of suit. From this order the defendant in that action appealed to the supreme court, where the decision of the district court was affirmed. See 18 Neb., 463. The alimony ordered to be paid, including the allowance for attor-

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ney's fees, being unpaid, an execution was issued and levied upon the real estate of the defendant. On the 15th day of January, 1886, and after the levy of the execution, the parties to the suit "settled and dismissed" the case. This settlement and dismissal was by a stipulation prepared by an attorney who had had no connection with the case for either party. Whether or not any money was actually paid is not shown by the record. On the day following the settlement the defendant in error filed and gave notice of an attorney's lien upon the \$300 and for the further sum of \$50 for money expended on behalf of plaintiff in said suit. On the 18th of the same month the stipulation for the dismissal of the action and acknowledgment of satisfaction of the order for alimony were filed with the clerk of the district court. On the first day of February following, defendant in error filed a motion to set aside the settlement, upon the ground that it was made collusively and with the intent and purpose of defrauding him and preventing him from obtaining the compensation due him as the attorney for the plaintiff in the action. This motion was sustained, and plaintiff in error was ordered to pay into court the sum of \$300. The order was based upon the following findings of fact:

"1st. That there is due and owing to the said R. W. Sabin the sum of \$300 for his services as attorney for and on behalf of said plaintiff in and about the management of said cause.

"2d. That the said satisfaction filed January 18th, 1886, of the decree for temporary alimony heretofore rendered in this cause, was made by and between said Lena Aspinwall, plaintiff, and said O. C. Aspinwall, defendant, for the purpose of cheating and defrauding the said R. W. Sabin out of said amount due him for services performed by him as attorney of and for plaintiff in and about the management of this cause.

"3d. That the said satisfaction of said decree for tem-

porary alimony is collusive, fraudulent, and void as against the said claim of the said R. W. Sabin for said attorney fee due him as aforesaid, and the said satisfaction should be set aside and be held for naught, so far as the same in any manner interferes with the collection from the said defendant of the amount of said attorney fee due the said R. W. Sabin as aforesaid.

"4th. That at the time of the making, signing, and filing of the said satisfaction of the said decree for temporary alimony, the said Lena Aspinwall, plaintiff, and the said O. C. Aspinwall, defendant, well knew that the said R. W. Sabin had a lien for his services as plaintiff's attorney in said cause for the sum of \$300, and that no part of the same had been paid.

"5th. That at the time of the making, signing, and filing of the said satisfaction of said decree for temporary alimony, the said O. C. Aspinwall, defendant, had due and legal notice of the lien of the said R. W. Sabin upon the said decree for the amount of \$300 for his services as attorney for and on behalf of said plaintiff in said cause as aforesaid."

It is insisted that the court erred in these findings, and that the findings should have been in favor of plaintiff in error. This question cannot be examined for the reason that the certificate of the judge of the district court, attached to the bill of exceptions, shows affirmatively that the evidence before him at the hearing of the motion is not all included therein. The certificate is as follows:

"In addition to the above, the other affidavits contained in the former bill of exceptions heretofore signed and filed in this case were considered by the court. And be it further remembered that the foregoing as above stated is all the evidence offered on the trial of said cause either by the said R. W. Sabin or the defendant, and the objections made to the evidence, the rulings of the court thereon and exceptions thereto, and the said defendant prays the court now here to sign and seal this, his bill of exceptions, which is accordingly done," etc.

Every presumption is in favor of the correctness and regularity of the proceedings of the trial court, and error cannot be presumed. *Bedford v. Ruby*, 17 Neb., 98. Therefore it should affirmatively appear that the bill of exceptions contains all the evidence submitted to the trial court. *R. R. Co. v. Menk*, 4 Id., 21.

It is said that "the court had no jurisdiction of the subject-matter, the case having been settled and dismissed by the parties to the action and the costs paid." In support of this position the decision of this court in *Lavender v. Atkins*, 20 Neb., 206, is cited. We do not think that case is in point here. As we have seen, the finding of the court in this case is that plaintiff in error and his wife had full notice of the lien of the defendant in error, and that the settlement was made collusively and fraudulently for the purpose of defrauding defendant in error. So far as this proceeding is concerned, this finding must stand as true. In the case cited it is said: "No question of attorney's lien arises. No effort was made to comply with the provisions of the statute conferring such lien. Whatever rights Lavender's attorneys may have against defendants, if any, arise solely upon their contract, and cannot be litigated in this proceeding." In that case the attorneys sought to intervene and continue the litigation of the main case as plaintiffs. In this case the alleged settlement is attacked as fraudulent in so far as it affects the rights of defendant in error. It is a well-settled principle of law that fraud vitiates everything into which it enters. *School District v. Randall*, 5 Neb., 411. Therefore, if the settlement was made as found by the court, it was void as to defendant in error.

No notice of the pendency of the motion was given to or served upon Lena Aspinwall, the plaintiff in the original case. This fact is urged in support of the contention that the district court had no jurisdiction over her, and therefore could not legally make the order complained of.

Hughes v. Reese.

As no relief is sought as against her, and it is not sought to affect her rights in any particular, and no judgment or order was rendered against her, we cannot see that for that reason a judgment could not be entered against plaintiff in error, who appeared to the merits without objection.

No error affirmatively appearing of record, the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

ISAAC R. HUGHES, APPELLEE, v. WALTER R. REESE
AND MARTHA PRICHARD, ADMINISTRATRIX OF THE
ESTATE OF JOSEPH PRICHARD, APPELLANTS.

Evidence examined, and *Held*, To sustain the decree of the district court.

APPEAL from the district court for Buffalo county.
Heard below before HAMER, J.

Calkins & Pratt, for appellants.

W. L. Greene, for appellee.

REESE, J.

This action is for the specific performance of a contract for the sale of real estate. The allegations of the petition are, in substance, that on the date of the alleged contract plaintiff purchased of defendant Prichard a quantity of land, containing in all 320 acres. The land in dispute consists of eighty acres held by Prichard under a contract with the Union Pacific Railroad Company, the payments for

which had not all matured. It is alleged that in the purchase this land was valued at \$400; the unpaid part of the purchase price due the railroad company to be deducted therefrom and assumed by plaintiff, leaving \$225 to be paid Prichard. That at the time of the completion of said contract Prichard made the proper conveyances by which he transferred the other lands to plaintiff, but that by a mistake or oversight, as he claimed, he had omitted to bring with him the contract with the railroad company for the land in question, they having been mislaid, but that he, Prichard, would find them and cause the proper assignment to be made. That plaintiff has at all times been ready and willing to comply with the contract on his part and make the payments due, but that upon demand Prichard has failed and refused to make the transfer of the contracts. That relying upon his purchase he took possession of the real estate and has made valuable, permanent, and lasting improvements thereon. That defendant Reese had full knowledge of his purchase and possession, but that by a fraudulent collusion with Prichard he had assumed and pretended to purchase the land of Prichard and had taken an assignment of the contracts therefor.

The answer of Reese is to the effect that Prichard held the land by contracts with the Union Pacific Railroad Company, and that for a valuable consideration he had in good faith purchased the same and had received the assignment thereof, which had been approved by the railroad company, and that said contracts contained a provision that no assignment thereof should be valid without the consent of the railroad company endorsed thereon in writing. Certain payments to the railroad company are pleaded, and the averments of the petition are denied generally. To this answer plaintiff filed a reply consisting, in substance, of a general denial of its allegations.

The answer of Prichard was in all essential respects similar to that of Reese, with the further averment that the

failure to assign the contracts to plaintiff was owing to his refusal to pay the purchase money, which had been often demanded, and that after waiting more than a year therefor he had in good faith sold the contracts to Reese.

To this answer no reply was filed, but some time thereafter the death of Prichard was suggested of record and the cause was revived against Martha Prichard, the administratrix of his estate, who filed an answer to the petition disclaiming any interest in the subject-matter of the action adverse to either of the other parties, but claimed it as belonging to the estate of Prichard. There appears to have been no effort to establish this claim of ownership. The decree was in favor of plaintiff. Defendant appeals.

In view of the subsequent answer of the administratrix, we must treat the former answer of Prichard as out of the case and dispose of it upon the issues presented by the pleadings filed by plaintiff and defendant Reese.

As we understand the case presented by appellant, it is that the decree is not supported by sufficient evidence. Not that the testimony was conflicting and that the decision of the trial court was against the weight of evidence, but that upon the whole case there was not sufficient shown to entitle plaintiff to the relief sought. We cannot so view it.

There is no doubt but that the land was purchased by plaintiff as alleged in his petition. This is admitted. It must also be said to have been proven with sufficient clearness that at the time of the payment of the money and the execution of the conveyances of the other lands purchased, the only reason assigned by Prichard for the failure to transfer the contract was, that by inadvertence, or for some other reason, he had failed to bring with him to the office where the transfers were made, the contracts upon which the assignments should be endorsed. It was then agreed that the transfer should be made at another time, and \$100 of the money paid was given back to plaintiff to be used by him until the proper assignment was made. Plaintiff

then took possession of the land in question, made improvements thereon, and still retains possession; all of which was known to appellant when he made the purchase of Prichard. I quote from his cross-examination as follows:

"I understood that he, Hughes, bought a portion of Prichard's land. I knew the breaking was done, and the well dug, and the stable put up there. I cannot say at what time I talked with Prichard about purchasing this eighty, but some little time before I bought it in the summer he spoke about it, and then I guess nothing was said about it until a day or two before I made the trade. I did not, before or at the time of buying the land, inform Hughes that I talked of buying the place. I made no inquiries to learn if Hughes owned the land only of Prichard, when I got the papers," etc. He resided about a half mile from the land. The improvements spoken of were made upon the land in dispute. It is therefore apparent that appellant Reese was charged with full notice of all the rights of plaintiff and that his purchase was subject thereto.

It is quite clear that, while separate valuations were placed upon the three tracts of land included in the purchase, yet the contract between plaintiff and Prichard for the purchase of the three tracts was an entire contract, and the apparently unexpected absence of the contracts with the railroad company alone prevented its completion on the day the other transfers were made. John H. Roe, who was a witness for plaintiff, testified upon the trial that Prichard and plaintiff came to his office after they had been to the court house to relinquish the pre-emption claim, "that Prichard was to have transferred the contracts to two eighties of railroad land, and he did transfer the contracts to one eighty, and felt in his pockets for the contracts to the other eighty, and seemed surprised not to find them," and the witness continues: "I think he went to another part of the room and looked in his overcoat pocket,

and came back and said he must have left the other contract at home in his trunk, and would bring them down the next time he came and assign them. Then Hughes paid the money. I know I was making a receipt for a back payment at the time to Hughes. I counted the money—just \$800, including a check for even \$600, and the balance in gold.” The witness further testified that some minutes afterwards Prichard stated that he would not need all the money until the next fall, and returned to plaintiff \$100, to be used by him until that time.

In consideration of all of these facts and of the fact of the possession by plaintiff of all the land purchased, and the compliance with the terms of the contract on his part, we think he is entitled to the performance thereof.

The decree of the district court is therefore affirmed.

DECREE AFFIRMED.

THE other judges concur.

PETER CONNELLY AND PATRICK DUFFY, PLAINTIFFS IN
ERROR, v. CHARLES W. EDGERTON AND DAVID N.
MILLER, DEFENDANTS IN ERROR.

1. **Fraud.** The question of intent, in case of an alleged fraudulent conveyance of property, is one of fact, to be decided by the trial jury under the instructions of the court.
2. **Witnesses: EXAMINATION.** Where, in the examination in chief of a witness, a question is asked to which objection is made, which is sustained, the party desiring the evidence must offer to prove the facts sought to be established, before error can be assigned upon such ruling.
3. **—: EXPERT TESTIMONY.** Where a competent witness is called as an expert to testify as to the value of property, his

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32 486

22 82
33 758

22 82
34 404

35 256
36 801

22 82
38 110

38 396
22 82

40 515
40 827

41 252
22 82

43 155
22 82

46 394
22 82

48 379
22 82

50 863
53 732

54 780
22 82

57 753

Connelly v. Edgerton.

testimony is not rendered inadmissible by reason of the fact that he had not seen the property since about one month prior to the time when the value was to be established; it being shown by other testimony that the property was in substantially the same condition at both periods of time.

4. ———: ———. Where a witness is called as an expert to testify as to the value of property in dispute, and it is shown upon examination that he is competent to so testify and his testimony is taken, and upon cross-examination he is asked if his estimate of value is not based on what he would give for the property, which he answers in the affirmative, a motion to strike from the record all of the testimony of the witness was properly overruled. Such answer would not render the witness incompetent to testify, but, if unexplained, might tend to diminish the weight of his testimony.
5. **Judgment.** As to parties before the court, and respecting a matter within its jurisdiction, a judgment without a finding to support it is not void, but, at most, merely erroneous, and subject to reversal by a suitable proceeding in a tribunal having authority to review it. *Doty v. Sumner*, 12 Neb., 378.
6. **Attachment: JURISDICTION.** Where proceedings in attachment are irregular and amendable, but not void, and no objection is made thereto by the defendant in the action, such proceedings cannot be attacked or questioned collaterally by third parties.
7. **Levy: SEVERAL WRITS.** Different attachments of the same property may be made by the same officer, and one inventory and appraisalment will be sufficient, and it is not necessary to return the same with more than one order. Civil Code, § 209. Therefore when a constable receives an order of attachment and proceeds to levy the same on a part of a stock of goods, and before making the inventory and appraisalment other orders of attachment are placed in his hands for execution, he may properly levy upon property of sufficient value to satisfy all of such orders, and make but one return of the inventory and appraisalment. In such case he cannot be charged with making an excessive levy, unless the value of the property seized exceeds a proper levy to satisfy all such orders and probable costs; and even in such case the question can only be raised by the parties to the action. As between third parties in a collateral proceeding, the levy would be valid.
8. **Verdict in an action of replevin, Held, Sufficient.**

ERROR to the district court for Douglas county. Tried below before WAKELEY, J.

J. J. O'Connor and Thurston & Hall, for plaintiffs in error.

Redick & Redick, Howard B. Smith, and Charles Ogden, for defendants in error.

REESE, J:

This was an action in replevin instituted by plaintiffs in error (who claim the possession of the property in dispute, by virtue of a chattel mortgage) against defendants in error (a constable and the sheriff of Douglas county), who also claimed the possession, but by virtue of the levy of certain attachments upon it as the property of the mortgagor. The contest is between the mortgagees and creditors—the former asserting the *bona fides* of their mortgage, the latter contending that it is fraudulent. The decision of this question of fact was peculiarly within the province of the trial jury, and we are unable to see that it should be disturbed.

The actual indebtedness at the time of the execution of the mortgage was about \$1,800, while the mortgage was given to secure two notes—one for \$400, due in ninety days from its date, and one for \$7,600, due in five years from date, each drawing interest at the rate of ten per cent per annum, the former bearing date August 13, the latter August 16, 1883. The testimony in the case is quite voluminous, and we can see no good purpose to be subserved by discussing it at length. While it is true that the fact that the mortgage was given for a larger amount than the actual indebtedness is not by any means conclusive evidence of fraud, and especially so when the explanation is sought to be made that the excess was for the purpose of

covering future advances and credits to be made by the mortgagee to the mortgagor, yet such an overstatement of the debt may be said to indicate fraud, and the question then becomes one for the trial jury to decide, under all the circumstances of the case and the instructions of the court. Jones on Chattel Mortgages, § 92, and cases there cited. In connection with the fact of the amount named in the mortgage and notes being largely in excess of the actual indebtedness, the further fact that the mortgagor was permitted to retain possession of the mortgaged property and sell the same in the usual course of trade (the property being the fixtures, furniture, and stock of liquors in a saloon), together with the explanation that all the proceeds of such sale were to be applied to the payment of the indebtedness secured by the mortgage, was submitted to the jury under proper instructions. The whole question of fraudulent intent on the part of the parties to the mortgage was before the jury. Their verdict must be final, if no other of the alleged errors occurring on the trial are found to call for a reversal of the judgment.

It was shown by the testimony of Peter Connelly, one of the plaintiffs, that he was in the wholesale liquor trade. He was then asked to "state whether or not it is not the custom among wholesale liquor men to do this kind of business," referring to taking the notes and mortgage for a larger amount than the actual indebtedness, for the purpose of covering future advances. This question was objected to upon the usual grounds, and the objection was sustained, to which an exception was taken, and the ruling of the court is now assigned for error. While we think the ruling of the court was correct, yet, under the repeated decisions of this court, no error can be successfully assigned in such case without an offer of proof of the facts sought to be established. *Mathews v. The State*, 19 Neb., 338. *Masters v. Marsh*, Id., 462. *Lipscomb v. Lyon*, Id., 522. No such offer was made.

One Stubendorf, who was one of the appraisers in the attachment proceeding, which was about one month prior to the institution of this suit, was a witness, and was asked as to the value of the property at the time he examined it and made the appraisal. Over the objection of plaintiff he was permitted to testify. No objection is made as to his competency. It being shown that the property remained in the same condition from time of the appraisal until the seizure under the replevin proceeding—the testimony was admissible as tending to prove the value at the time of the replevin. It was for the jury to weigh and compare with all the other testimony upon the same subject, and while, possibly, not entitled to as much credence as if the estimate had been made on the date of the levy, yet it was competent.

Objection is made to the ruling of the court in allowing the witness, Orchard, to testify as to the value of linoleum. This objection is based upon the alleged fact that no such property had been levied upon, and that the effect of the testimony was to increase the value of the property in dispute, in the estimation of the jury, when in fact there was no such item in dispute. The linoleum referred to was the matting or floor covering for the saloon, purchased by the mortgagor of the witness. It very clearly appears that the name given by the witness referred to the property in dispute, but which by the other witnesses was denominated oil cloth. The testimony clearly referred to the same article, and was therefore properly admitted.

One Charles Little was called as a witness, on the part of the defense, for the purpose of proving the value of the fixtures in the saloon, they being a part of the property in dispute. He testified that he had been engaged in the saloon business ten or twelve years, had purchased the property spoken of, and was acquainted with their values, and testified to the same. On cross-examination he was asked, if in giving his estimate of the values he did not

base it on what he would be willing to give for them. His answer was, he did. In view of this answer, counsel moved to strike the whole of the testimony of the witness from the record. The motion was overruled, and properly so. The witness had shown himself to be a competent one, having experience and knowledge of the matters concerning which he testified. The single answer made might serve, in some degree, to diminish the weight of his testimony, but it could not render it inadmissible.

Objection was made to the introduction of the dockets of various justices of the peace, showing judgments against McGuire, the mortgagor. As there are a number of these judgments attached to the record as exhibits, we will not discuss the objection to each one separately, but will notice the objections in a general way. It is urged that some of them showed upon their face that they had been tampered with; meaning, we suppose, that they had been changed since their entry upon the docket. As the transcripts attached to the record are wholly silent upon this point, and no proof was offered thereon, it would be impossible for us to say, from the record, whether the judgments were as originally rendered or not, but we must presume they were. Others are attacked because they contain no finding of fact. While this would be sufficient to reverse a judgment by the proper proceeding in error, yet the judgment is not for that reason void. *Hansen v. Bergquist*, 9 Neb., 278. *Doty v. Sumner*, 12 Id., 378. *McNamara v. Cabon*, 21 Neb., 589.

It is claimed that the levy under the first writ of attachment was void, and therefore all subsequent levies must fall with it. We do not believe the first levy was void, although somewhat irregular. It might be subject to be set aside by the court to which it was returned, and yet be valid when collaterally attacked. This writ was issued by the county court in an action in which the sum claimed was \$210.00. By section 16 of chapter 20, Compiled

Statutes, it is provided that the proceedings upon such orders shall be the same, as near as may be, as in actions brought in the district court. Section 210 of the civil code provides that the officer shall, "In the presence of two residents of the county, declare that by virtue of said order he attaches said property at the suit of the plaintiff, and the officer, with the said residents, who shall be first sworn or affirmed," shall make an inventory and appraisement, etc. Instead of strictly following the provisions of this section, the officer seems to have followed section 929, which provides for the levy of attachments issued by a justice of the peace. His return recites that he, "In the presence and hearing of Charles Ogden and Fred. Getsche, two credible persons, did declare that by virtue of this order, I attached said property at the suit of Max Meyer & Co., and I did then and there attach it, and I then, with Fred. Stubendorf and Henry Nestor, two householders of the county of Douglas, after administering to them an oath to truly inventory and appraise said property, made a true inventory and appraisement," etc. The contention is, that as the witnesses of the attachment did not make the appraisement, the levy and possession were wrongful and void. We think differently. It is quite probable that had objection been made to the return in the county court, the return might have been set aside, if not amended so as to conform to the law, or a new appraisement might have been ordered. But the levy, the seizure of the property, when attacked in this collateral way, cannot be held to be void. We know of no rule requiring so strict a construction of this section of the code.

It is claimed that the levy under this writ was excessive. If so, it should have been set aside in the court having jurisdiction of the cause. *Pugh v. Calloway*, 10 O. S., 488. But the evidence shows that after the levy and before the appraisement the other attachments followed, and therefore it was proper that but one appraisement should

be made. Civil Code, § 209. Again, these proceedings all seem to have been satisfactory to McGuire, the defendant in the actions, and so long as he was satisfied, and permitted them to go unquestioned, they ought to stand, the court wherein the proceedings were had having jurisdiction. The same rule must apply to objections made to the affidavit for attachment. It appears that in the caption or title of the cause the name of Patrick Duffy was inserted instead of P. H. McGuire. The docket of the county court shows affirmatively that an affidavit for attachment was filed in the cause. Had objection been made by McGuire to the form of the affidavit, it would doubtless have been sustained unless cured by amendment. But no such objection was made. These plaintiffs cannot question it in this action. *Rudolf v. McDonald*, 6 Neb., 166.

The last objection which demands our attention is as to the verdict of the jury. It is as follows, omitting the formal parts:

"We, the jury duly empaneled and sworn to try the issues joined in the above entitled case, do find for the defendants. We further find that at the commencement of this suit the defendants were entitled to the possession of the property in controversy. We further find that the value of said property, being the interest of the defendants therein, was \$2,597.00, and we assess the damages of said defendants by reason of the wrongful detention of the property at \$246.16, being the interest on said value to the first day of this term."

It is insisted that this verdict does not find the value of the possession of defendants as required by law.

Section 191 of the civil code is as follows: "In all cases where the property has been delivered to the plaintiff, where the jury shall find, upon issue joined, for the defendant, they shall also find whether the defendant had the right of property or the right of possession only at the commencement of the suit; and if they find either in his

favor, they shall assess such damages as they think right and proper for the defendant; for which, with costs of suit, the court shall render judgment for the defendant."

The verdict finds for the defendants and that they were entitled to the possession of the property; it also finds the value of the interest of defendants to be \$2,597.00 and the damages for the wrongful detention. This is a sufficient compliance with the section above quoted. It conforms in substance to the form given in Maxwell's Pl. and Pr., 489 and 490. There is no claim that the value of the interest of defendants as found by the jury exceeded the actual value of the property.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

22	90
33	459
22	90
28	602

THE NEBRASKA & COLORADO RAILROAD COMPANY, PLAINTIFF IN ERROR, v. MINNIE O. STORER AND M. L. STORER, DEFENDANTS IN ERROR.

- 1. Railroads: DAMAGES FOR RIGHT OF WAY: APPEAL.** Under the statute, as it stood prior to the act of March 31, 1887, in order to appeal from the assessment of damages which the owner of any real estate had sustained by the appropriation of his land to the use of any railroad corporation, it was only necessary to file in the office of the clerk of the district court of the proper county, within sixty days after the filing of the report containing the award of such damages with the county judge, a transcript of the condemnation proceedings upon which such award of damages was made.
- 2. —: —: —.** A paper headed "Transcript," but consisting of a certified copy only of the report of the commissioners appointed by the county judge to assess the damages, etc., containing their assessment and award of damages, *Held*, Sufficient to give the appellate court jurisdiction of the cause.

ERROR to the district court for Nuckolls county. Tried below before MORRIS, J.

T. M. Marquett and *J. W. Deweese*, for plaintiff in error.

H. W. Short, for defendants in error.

COBB, J.

This cause comes to this court upon a petition in error to the district court of Nuckolls county. The following errors are alleged:

"1st. The court erred in entertaining jurisdiction of said case against the objections filed by the plaintiff herein to the effect that no notice of appeal was ever served on the plaintiff herein by the defendant herein, and no transcript of the condemnation proceedings in the county court was ever filed on appeal in the district court by either party in the action.

"2d. The court erred in overruling the objections to entertaining the appeal, and in assuming jurisdiction, which were made by the plaintiff herein.

"3d. The court erred in impaneling the jury in said case to try the issues, and in rendering judgment against the plaintiff herein on the verdict of said jury."

But one paper was filed in the case in the district court, except the objections to the jurisdiction of the court to proceed, made on the part of the appellee in said court (plaintiff in error here). Said paper is headed "Transcript," and is duly certified to by the county judge of the proper county as being "a true and correct transcript of the commissioners' report as returned to the county court of Nuckolls county," and recorded. It does not contain the application of the railroad company, plaintiff in error, for the appointment of commissioners to appraise the right of way for the said railroad, nor the order or orders of the said county

court upon such application; but it contains, by way of recital, the fact of the appointment of said six disinterested freeholders, residents of Nuckolls county, by the county judge of said county, to appraise the damages accruing to the appellees by reason of the appropriation of the real estate therein described taken for right of way, side track, and railroad purposes by the Nebraska & Colorado Railroad Company, situated in said county, as shown by the plat and profile of said road as submitted to the said commissioners by the agent of said railroad company; also describing said land and specifying the amount of such damage as found by the said commissioners. Which said transcript also contains, appended to the said report of commissioners, a certificate of the said county judge of the payment by the said railroad company into the hands of said county judge, for the owners of said land, the amount of the said award of damages, etc.

The question raised by this petition in error is clearly one of jurisdiction. The theory of the plaintiff in error is, that the district court had no jurisdiction of the case, except to refuse to hear or consider it.

In the case of *Gifford v. The R. V. & K. R. R. Co.*, 20 Neb., 538, we held that "the right of appeal from the award of commissioners in the assessment of damages sustained by an owner of real estate by the appropriation of the same to the use of a railroad corporation, may be availed of and perfected by the filing of a transcript from the county judge of the condemnation proceedings," etc.

In the case at bar the paper headed "Transcript," hereinbefore referred to, was filed in the office of the clerk of the district court within sixty days from the filing of the award of damages with the county judge, and so if it is a transcript there was an appeal taken, and the district court had jurisdiction of the cause. It cannot be contended that it is a perfect or complete transcript. Neither can it

be said not to be, in part, a transcript of the condemnation proceedings. The condemnation proceedings, doubtless, consist of the application of the railroad company, appellant, to the county judge for the condemnation and assessment of damages of its right of way upon and across the lands of appellees, either separately or with others; the precept of the county judge directing the sheriff to summon commissioners to assess the damages, with the return of the sheriff thereon; and the "report in writing to the county judge" of the said commissioners of the discharge of the duty for which they were appointed, with the amount of damages as found by them, etc. A perfect and complete transcript would embrace copies of each of these papers. But does not the filing in the proper office, within the limited time, of a certified transcript, consisting of copies of two, or even but one, of said papers, confer upon the district court jurisdiction to compel the supplying of the missing papers by an order in the nature of a *certiorari* to the county judge? There can be no doubt of it. It follows, then, that that which has been done is not void, it being susceptible of amendment.

Proceedings by suggestion of a diminution of the record and application for an order to the county judge in the nature of a *certiorari* to send up the balance of the record were open to the appellee as well as the appellant. It was not necessary that the record should be perfected in order to give the district court jurisdiction; for we have seen, as I think, that it already had jurisdiction for one purpose, and I think that it is of the nature of jurisdiction that if it exists for one purpose it exists for all purposes. But it often occurs that while a court has jurisdiction of a cause it finds itself powerless to do full justice between the parties, for the want of a full and perfect record. When such proves to be the case such record or the additional papers necessary to perfect the record will be ordered supplied by the court, upon the suggestion and motion of either

party to the cause. Formerly this was accomplished by writ of *certiorari*, which would only issue in such case upon a suggestion of a *diminution* of the record. Under the present system of practice the order of the court in which the cause is pending upon appellate proceeding, on the court or tribunal below, takes the place of the more formal and expensive writ. If after one order has issued and a return made thereto it appears that the record is still imperfect, other orders may issue on the suggestion of the same or the opposite party. And such was the law in the time of James the First. See *Smith v. Henry Skipwith*, Cro. Jac., 277. In practice, when either party conceives that the record as returned by the court below is defective in that it does not truly present some matter or proceeding of such lower court necessary to the proper presentation of his case or defense, he will suggest such defect and obtain an order for the supplying of the deficiency, and not otherwise.

In the case at bar, in order that the records of the district court be logically and historically perfect, they should have been made to show the application by the railroad company to the county judge for the condemnation and appraisement of damages, etc., and the issuance of the precept by the county judge to the sheriff for the summoning of the six freeholders of the county to appraise the damage, as well as the finding and appraisal and damages, as made by them, but it was not necessary that the record contain those papers in order to enable the court to do justice between the parties. One of them was prepared and filed, and the other sued out, served, and acted upon, by the railroad company, appellee in the district court and plaintiff in error here. It was therefore bound by both the form and substance of such records, as well as by the action of the county judge and the appraisers appointed by him, it not having appealed therefrom, and could not have desired a transcript of such papers for the purpose of basing

any motion or other action thereon in the district court. But even if it did, the way was open, as we have seen, for it to have caused the same to be supplied. On the other hand the appellants in the district court, and defendants in error here, made no objection to the form or substance of the application of the railroad company to the county judge, nor to the precept or other actions of the county judge thereupon, nor to the persons selected as disinterested freeholders of the county to appraise the damages contemplated by such action. They only appealed from the consideration and judgment of such commissioners as to the amount of damages which they had sustained by reason of the taking of the right of way for the railroad of said company over and upon the lands of the appellant. For the purpose of retrying the question of the amount of such damages before the district court and a jury, it is not conceived possible that any reference would necessarily have been had to either of the papers not embraced in the transcript, and so, while the court would probably out of abundant caution have lent its aid to either party upon its application for an order requiring the missing record to be supplied, yet I do not think that in the absence of such application it was error on the part of the district court to hold jurisdiction of the case, and to try and determine it, in the absence of the papers above specified.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

22 96
57 284

THE DAKOTA STOCK AND GRAZING COMPANY, LIMITED, PLAINTIFF IN ERROR, v. EDWARD R. PRICE, FRANK PRICE, LEWIS G. JENKS, AND CHARLES W. SEABURG, AS PRICE & JENKS, DEFENDANTS IN ERROR.

Contract: RESCISSION: PAYMENT: TENDER. D. company purchased of P. & J a herd of cattle and calves, ranch, the possessory right of herding range, and miscellaneous outfit of herding and ranching property, situated at and known as "The Chadron Creek Ranch," on Chadron Creek, in Sioux county, Nebraska. The purchase price was \$76,530, \$50,000 of which was paid down, the remaining sum, \$26,530, was to be paid on or before the 26th day of June, next ensuing the date of purchase, April 7th, 1883; also a sum equal to the running expenses of the herd from December 26th, 1883, to the day of payment. There was a bill of sale, expressing the terms of sale as above, signed by P. & J., and placed in escrow in a bank at Cheyenne, Wyoming Territory, with the following memoranda: "Placed in escrow with Morton E. Post & Co., this 10th day of April, 1884, to be delivered to said Dakota Stock & Grazing Company, Limited, upon compliance by said company with the terms of within instrument, such compliance to be evidenced by the acknowledgment in writing thereof by Price & Jenks, otherwise to be returned to Price & Jenks." About the 4th day of June, the agent of D. Co. informed P. & J. personally, at the city of Chicago, that he was on his way to Cheyenne, and the Chadron Creek ranch, for the purpose of closing up said business. On the 6th he wrote them from Council Bluffs, Iowa, requesting them to come or send an order to Chadron Creek, whereby, on their part, the business might be settled up; and again on the 10th, he telegraphed them from Cheyenne to the same purpose. On the 11th P. & J. replied by telegraph from Chicago: "Impossible to make delivery or settlement now. Will be in Cheyenne prepared June 26th."

In an action by D. Co. to rescind said contract and recover back the money paid thereon, *Held*,

1. That D. Co. was not in default by reason of its not paying or tendering the \$26,530 due on the contract of purchase, and a sum equal to the expense of keeping the herd, as provided in the contract, at the bank of Morton E. Post & Co., at Cheyenne, P. & J. declining to give any assurance that the property at Chadron Creek ranch would be delivered, or the dominion thereof turned over to it on that day.

2. That P. & J. were in default in failing and refusing to take the necessary steps to enable them to deliver the possession, control, and dominion of the property to D. Co. on the 26th day of June, or sooner, in case D. Co. chose to make payment and "take over" the property before that date, and in failing to deliver the property sold on the date last above mentioned.

3. That upon the facts and law above stated, D. Co. may rescind the contract of purchase, and recover back the money paid thereon.

ERROR to the district court for Lincoln county. Tried below before HAMER, J.

J. C. Cowin, for plaintiff in error.

John L. Webster and *J. M. Wochworth*, for defendants in error.

COBB, J.

This action was, in effect, an action to rescind a contract made by the plaintiff company with the defendants for the purchase by it, from them, of a quantity of personal property, and to recover back from them a sum of money paid thereon. The contract was evidenced by a paper writing executed by the defendants to the plaintiff, in the form of a deed, which I here copy from the bill of exceptions:

"Know all men by these presents: That we, Price & Jenks, a firm composed of Edward R. Price, Frank Price, and Lewis G. Jenks, existing and doing business in the county of Laramie, Wyoming, and Charles W. Seabury, of Boston, Massachusetts, by Price & Jenks, aforesaid, his agents and attorneys in fact, and Theodore W. Sterling, of New York City, by Price & Jenks, his agents and attorneys in fact, parties of the first part, and the Dakota Stock and Grazing Company (limited), a corporation created and existing under and by virtue of the laws of the kingdom of

Great Britain, and doing business in the territory of Wyoming, party of the second part, witnesseth:

"That for and in consideration of the sum of ten thousand (10,000) dollars, lawful money of the United States of America, to the said parties of the first part in hand paid, at or before the ensealing and delivery hereof, receipt whereof is hereby acknowledged, and the further sum of forty thousand (40,000) dollars, lawful money of the United States of America, to be paid by the party of the second part to the parties of the first part on or before the tenth (10th) day of April, 1884, and the further sum of twenty-six thousand five hundred and thirty (26,530) dollars, lawful money of the United States of America, and also a sum in like money equal to all the running expenses of the herd of neat cattle and property hereinafter described and hereby conveyed, paid, laid out, or incurred by said first parties—from and including the twenty-sixth (26th) day of December, 1883, up to and including the day of such payment, to be paid by the party of the second part to the parties of the first part, on or before the twenty-sixth (26th) day of June, 1884—

"The said parties of the first part have sold and conveyed, and by these presents do hereby sell, assign, transfer, convey, and set over unto the said party of the second part, and to its successors and assigns, all the following described neat cattle, horses, mules, ranches, buildings, fences, improvements, brands, grazing rights and privileges, goods and chattels, situate, lying, and being on Chadron creek, Sioux county, Nebraska, and more particularly described as follows, to-wit:

"All the herd of neat cattle and all the neat cattle composing the herd of the said parties of the first part, consisting of seventeen hundred and thirty-three (1,733) head of grown neat cattle, and six hundred and eight (608) calves, the increase of the said neat cattle, as the said neat cattle were tallied, and the said calves were branded and tallied

during the year 1883 by the said parties of the first part as the same are now running or ranging, be they more or less, at the date of the execution hereof, on the range of the said parties on and in the county adjacent to Chadron creek, Sioux county, Nebraska, or wheresoever the same or any part thereof, may be running, ranging, or be found; the said neat cattle all being branded and marked with one or more of the following brands, to-wit:—"E," "E," "ET," and also all the increase of the said neat cattle, branded, unbranded, or hereafter to be branded.

"And also the brands aforesaid, as the same are now recorded in the county of Laramie, Wyoming, and in the county of Cheyenne, Nebraska, and all the right, title, and interest of the said first parties, or either of them, of, in, and to the said brands, and all the privileges and rights of the said first parties, or either of them, to the said brands appertaining, with full power and authority to the said party of the second part, and its successors and assigns, to have the said brands, or either of them, transferred to itself or others, according to law, where the same are now recorded in the names of said first parties.

"And also all the saddle horses of the said first parties belonging to and used in connection with the aforesaid herd of neat cattle, and now in, upon, and about the range and ranch of said first parties on Chadron creek aforesaid, and being in number sixty-seven (67) head, more or less, and all branded with the aforesaid "E" brand on the left hip.

"And also all the mules of the said first parties branded with the aforesaid "E" brand on the left hip, consisting of four (4) head, more or less, as the same are now running and ranging upon the ranch and range aforesaid of said first parties, and as the same are now being used in connection with the said herd of neat cattle. And also one log ranch house, one log stable, one log tool house and wagon shed, one log hen house, four (4) corrals, one wire

fence enclosing hay meadow, one wire fence enclosing garden, together with all other improvements, whether herein enumerated or not, of said first parties, situate on Chadron creek, Sioux county, Nebraska, aforesaid.

“And also all the possessory rights of said first parties, of, in, and to the ranch and range upon which the said neat cattle have been heretofore ranging and running, as the same have been, and are at the date of these presents, enjoyed, occupied, possessed, and held by the said first parties.

“And also all the branding irons of the brands aforesaid, three (3) wagons, one (1) mowing machine, one (1) rake, two (2) sets of harness, one lot of lumber, and all the camp, ranch and round-up outfits, and all tools, implements, machinery, utensils, furniture, provisions, and supplies, and all other articles of personal property belonging to said first parties, now in, upon, or about the said ranch, whether herein enumerated or not, to the said herd of cattle appertaining or belonging. To have and to hold the same, and each and every part and parcel thereof, to the said party of the second part, and to its successors and assigns forever.

“And the said parties of the first part for themselves, their executors, administrators, and assigns, hereby covenant and agree to and with the said party of the second part and its successors and assigns, that the number of neat cattle, as hereinbefore given, were actually by them tallied and counted; and that the number of calves stated as having been by them branded and tallied, were actually branded and tallied by them during the year 1883, and that they, the said parties of the first part, have not since the aforesaid tally and count of the neat cattle hereby sold and conveyed, sold or in any manner of disposed the same, nor of any part thereof; and that they have good right and lawful authority, in manner and form aforesaid, to sell and convey the aforesaid neat cattle, property, rights, and privileges; that the same, and each and every part and parcel

Dakota Stock Co. v. Price.

thereof, are now free and clear of and from any and all encumbrances and liens of what kind and nature soever; and that the same and each and every part and parcel thereof, except the possessory rights aforesaid, in the quiet and peaceable possession of said second party and its successors and assigns, against the lawful claims of any and all persons whomsoever they shall and will warrant, and by these presents forever defend.

"In witness whereof, the said parties of the first part have hereunto set their hands and seals, this seventh day of April, in the year of our Lord one thousand eight hundred and eighty-four.

"Signed, sealed, and delivered in presence of Samuel Rosendale.

"(Signed) PRICE & JENKS, [Seal.]

"(Signed) EDWARD R. PRICE, [Seal.]

By PRICE & JENKS,
His Attorneys in fact.

"(Signed) FRANK PRICE, [Seal.]

"(Signed) LOUIS G. JENKS, [Seal.]

"(Signed) CHARLES W. SEABURY, [Seal.]

By PRICE & JENKS,
His Attorneys in fact.

"(Signed) THEODORE W. STERLING, [Seal.]

By PRICE & JENKS,
His Attorneys in fact."

At the foot of said instrument appears the following receipt:

"CHEYENNE, April 10, 1884.

"Received from the Dakota Stock and Grazing Company, Limited, forty thousand (\$40,000) dollars, by hand of M. E. Post & Co., being the second payment on the within bill of sale.

"(Signed) PRICE & JENKS."

And accompanying it, the following memoranda:

"BILL OF SALE FROM PRICE & JENKS TO DAKOTA STOCK AND GRAZING COMPANY, LIMITED.

"Placed in escrow with Morton E. Post & Co., this 10th day of April, 1884, to be delivered to said Dakota Stock and Grazing Company, Limited, upon compliance by said company with the terms of within instrument, such compliance to be evidenced by the acknowledgment in writing thereof, by Price & Jenks, otherwise to be returned to Price & Jenks."

Although the delivery of the above instrument is duly witnessed, it seems to be conceded that it never was in fact delivered to the plaintiff but placed in the banking house of Morton E. Post & Co., at Cheyenne. The ranch and range on Chadron creek, Sioux county, Nebraska, where said cattle and other personal property were situated, are distant about two hundred miles from Cheyenne, which at that time was, as appears from the abstract, the nearest railroad or telegraph point thereto. There was no means of communication or travel between those two points, except private horseback or wagon, and the time necessary to travel from one point to the other was "four or five days in round numbers." In all the transactions of the case the plaintiff was represented by one Richard Frewen, its manager and agent. At the date of the deed, or contract for the sale of the property, the cattle, calves, ranch, and other property therein described, at Chadron creek ranch, were in the care, custody, and control of Robert Harrison, foreman of the defendants, and the cattle were being herded and cared for by him, with the assistance of some eight or ten hired men or cow boys, all in the service of the defendants. From the date of the contract of sale until the 23d day of June, 1884, Frank Price and Lewis G. Jenks, the active members of the firm of Price & Jenks, defendants, were both in Chicago, Illinois. On or about the first day of June, 1884, they, or one of them, wrote to

Robert Harrison, their foreman at the ranch, not to turn any of the property over to Mr. Frewen, nor to anybody else, until he had an order from them. About the middle of June, Frewen deposited \$33,000 in the hands of Morton E. Post & Co., at Cheyenne, and instructed G. W. Collins, their cashier, to pay to Price & Jenks the balance or final payment of \$26,530, together with the expense account for keeping the herd, on the 26th day of June, if they could show Mr. Collins, or would assure him, that the property would be delivered or turned over to him on that day. He then proceeded to the ranch on Chadron creek, arrived there on the 23d day of June, and informed Mr. Harrison, foreman in charge, that he would be there on the 26th day of June for the purpose of receiving, and prepared to receive, the possession of the herd, ranch, and other property embraced in the sale, and asked him whether he had received instructions from Price & Jenks to deliver the property. On the 26th day of June, Frewen again went to the Chadron creek ranch with his foreman, prepared to receive the possession of the property, and demanded the same from Mr. Harrison, the foreman of Price & Jenks, which was refused.

On the same day, the 26th day of June, Frank Price and Lewis G. Jenks went to the banking house of Morton E. Post & Co., at Cheyenne, and of G. W. Collins, cashier in charge, demanded payment of the sum of \$26,530 remaining unpaid on the cattle deal, also the expense account. Mr. Collins expressed his readiness and willingness to pay these sums on being satisfied, or assured, that the property would be delivered on that day; but declined to pay without such assurance. They declined to give such assurance, but offered to give him an order on their foreman for the property.

At the trial to a jury, upon proof of facts of which the foregoing is the substance, the district court directed a finding for the defendants, overruled the plaintiff's motion for a new trial, and rendered a judgment for the defendants.

The plaintiff brings the cause to this court on error. There are several errors assigned ; but as the case turns on the 6th, "that the verdict is contrary to law," and as counsel have not discussed them in detail, they will not be set out or specified here; and our discussion will be confined to the consideration of the correctness of the court's direction to the jury.

Counsel on neither side, either in their briefs or at the bar, attach much, if any, importance to the fact that the contract was delivered only as an escrow, but rather treat the terms of the contract as defining the rights of the parties, as well as their respective duties toward each other, the same as though it had been delivered to the plaintiff, or had existed only in parol. In this respect I will follow them in considering the law of the case.

As we have seen, the purchase price of the property, as agreed upon, was seventy-six thousand five hundred and thirty dollars. Fifty thousand dollars of this sum was paid at and about the date of the purchase, leaving twenty-six thousand five hundred and thirty dollars to be paid without interest on or before the 26th day of June next ensuing. No place of payment is named in the contract, nor in the memorandum accompanying the same when delivered in escrow to Morton E. Post & Co. Neither is it to be gathered from the language of such contract or memorandum, or the facts and circumstances of the case, as they appear to me, that it was the intention of the parties to make Cheyenne the legal place of payment. I conclude, therefore, that the money was payable to the defendants generally, unless the location of the property which it was the duty of the defendants to deliver to the plaintiff simultaneously with such payment be held to have made the place of payment at the site thereof. The additional sum, being the amount of the running expenses of the property pending the negotiations and making of the final payment, will be referred to further on, but for the present I will observe

that it was doubtless the intention of the parties that it should be payable at the same time and place as the final payment on the property.

It may be admitted, as contended for by counsel for defendants in error, that upon the making of the contract, and payment of the fifty thousand dollars thereon, the title in the property passed to the plaintiff in error, yet it is evident that neither the possession nor the right of possession of the property passed to it at that time.

The case of *Marsh et al. v. McPherson*, 105 U. S., 709, cited by counsel for the plaintiff, arose out of the sale of a large number of combined reapers and mowing and self-raking machines, then in the hands of local agents of the vendors at various points in Nebraska and Kansas. The contract or bill of sale acknowledged payment in full for said machines, and contained words of present grant, delivery, and warranty. In the opinion the court say: "The contract undoubtedly had the effect to pass the title to the machines from Marsh & Marsh to McPherson, and the right of possession; but whether the purchaser obtained actual possession could not be conclusively inferred from the contract merely."

There are many cases like *Leonard v. Davis*, 1 Black, 476, cited by counsel for defendants in error, where it was held that where certain saw logs were sold while floating in the water and only in the constructive possession of the owner, a symbolic delivery was sufficient to pass the title.

The case of *Boynton v. Veazie*, 24 Me., 286, which was also a saw log case, is an authority to the same effect. I quote from the syllabus: "The law relating to the delivery of personal property does not require parties to a sale to perform acts extremely inconvenient, if not impossible; but it accommodates itself to their business and to the nature of the property." See also, *Chaplin v. Rogers*, 1 East, 192.

In the case at bar, the property was in the actual posses-

sion of the vendors. Through their foreman and hired men, they were in its actual possession as much as though it had been locked in their stables; and while it is true that it was not contemplated by the parties to the sale that the cattle would be rounded up on the 26th day of June and tolled off head by head to the plaintiff, it was contemplated that the foreman of the defendants, the local commander of the forces through which the dominion of the defendants over the property was exerted and recognized, would be withdrawn, and the authority and proprietorship of the plaintiff recognized and acknowledged. That was the kind of delivery convenient and proper, in view of the business of the parties, and the nature of the property, and so the law "accommodates itself" thereto. That was the kind of delivery of the property which it was the duty of the defendants to make to the plaintiff on the 26th day of June, or on such day previous thereto as the plaintiff may have designated for closing up the transaction, and to give them reasonable notice thereof, and to be present by its officer or agent ready and willing to perform its part of the contract. The place of delivery was, in the nature of things, at the ranch on Chadron creek, the temporary residence of the foreman and men in charge of the property, and *prima facie* the place where the property was.

This, then, being the place of delivery, and the 26th day of June the day of payment, it must have been within the contemplation of the parties when making the contract that they would both be present there, on that day; the one to receive the money and deliver the dominion of the property, the other to make payment, and, in the language of the witness, "take over the property." I am strengthened in this belief by the consideration of the circumstance that it was, as already stated, provided in the contract that in addition to the payment of twenty-six thousand five hundred and thirty dollars, to be paid on or before the

26th day of June, 1884, there was also to be paid a sum of money equal to all the running expenses of the herd of neat cattle and property in said contract described and conveyed, paid, laid out, or incurred by the defendants from the 26th day of December, 1883, up to and including the day of such payment. It appears from the bill of exceptions that the claim presented under this head by defendants, at the bank at Cheyenne, on the 26th day of June, amounted to the respectable sum of three thousand three hundred seventeen dollars and ninety-nine cents, reduced by credits to three thousand two hundred fourteen dollars and sixty-four cents. When it is borne in mind that the plaintiff was necessarily represented in these transactions throughout by an agent, a person acting in a fiduciary capacity, it must be apparent that it was contemplated, or should have been, that this account would undergo some examination, scrutiny, and verification before it would be paid. Such verification, if properly and intelligently made, would require some time, and certainly the place to make it was at the ranch where the expenditures were made, the scene of the transactions out of which they grew. The company had a right to expect that the defendants would meet its agent at the ranch and there exhibit the bill of items of the running expenses of the herd, so as to enable him to discharge his duty to them by examining and verifying the same, so that the just amount of such running expenses might be paid according to the terms of the contract and within the time therein limited.

But it is contended that the money, both for the final payment on the price of the property, and the amount of the running expenses, must have been paid, or tendered, at Cheyenne, within the time limited, in order to put the defendants in default for failing to deliver the property, and thus give the plaintiff the right of rescission. This proposition would probably be unanswerable were it true that within the language of the contract, and under all the facts

and circumstances of the transaction, the money was legally payable at Cheyenne; but, as before stated, I have reached the conclusion that it was either payable at the ranch, or generally, to the defendants. Upon the first of these propositions we are reminded by counsel for defendants, in one or both of the briefs, that Frewen, the agent of plaintiff, when upon the stand as a witness on his cross examination, admitted that when he went to the ranch in June, expecting to "take over the property," he took no money with him. This is true, and had the defendants been present, ready to deliver the property upon the payment of the money, and had objected to receiving the plaintiff's check on the ground that it was not a legal tender, this would have put the plaintiff in default. But while plaintiff would have been legally in default, by reason of its agent not having carried that large amount of gold or legal tender notes to the ranch, yet in a business view it did quite the proper thing, to leave the money in bank, prepared to draw against it, and until objected to as not a legal tender, a check drawn against funds actually in bank would answer every legal purpose.

This was a legal action, and, of course, the questions involved must be decided on legal principles; but it was one of that class of actions which under the former nomenclature were called actions of assumpsit, an action which was not inaptly styled the equitable action of the common law. When a close or doubtful question is involved in a case of this character, it often occurs that the conduct of the parties in reference to the subject-matter, as tending to exhibit good faith and fair dealing, or the contrary, may be considered. This, I think, is especially the case in an action for the rescission of a contract.

In the case at bar, the plaintiff, a corporation, through some officer or agent not disclosed by the record, purchased from the defendants cattle and ranch property at the price, as hereinbefore stated, of seventy-six thousand five

hundred and thirty dollars, paying down in cash fifty thousand dollars, within a fraction of two-thirds of the entire price, and, not to mention other peculiarities of the transaction, agreeing to leave the entire property in the hands of defendants, at plaintiff's expense, for the period of nearly three months. Somewhat less than a month before the expiration of this time, the plaintiff sent its agent to this country for the purpose of paying the defendants the amount due them on this transaction and relieving them of the possession and further care of the property.

Arriving in New York in the early part of June, he wrote to the defendants, whom he knew then to be in the city of Chicago, advising them of the time of his probable arrival at that city, and expressing a desire to meet them at one of the hotels there in regard to this contract. Arriving at Chicago about the time designated, he had an interview with Mr. Price, one of the defendants. This interview seems not to have been a very satisfactory one to either side, on account of the engagements of Mr. Price, the indisposition of Mr. Jenks, and the haste of plaintiff's agent to get on to the scene of operations at Cheyenne and Chadron Creek. My only purpose in alluding to it is, to note that defendants then had ample notice that plaintiff had its agent in this country for the purpose of meeting its engagements with them.

Frewen, the plaintiff's agent, then proceeded west, and arriving at Council Bluffs, he wrote the defendants the following letter:

"COUNCIL BLUFFS, Monday, 6-6, 1884.

"MY DEAR SIR—You will, of course, do what you think best, but I would propose that you should at once send to Cheyenne a short statement showing what moneys have been paid out by you since the 1st of January, 1884, also show what moneys you have received on the herd and what still is owing you, and at the same time you must authorize some person to act for you, unless you or one of your part-

ners come out. If this can't be done, and done very quickly, you can't blame me if things don't go as you wish. You will also send instructions to your foreman to turn over everything to me on his receiving a telegram on or about the 26th. If you don't approve of this you can meet me at Cheyenne after I return from the ranch, I paying you the remainder sum for herd, leaving the matter of stores and wages to be dealt with on my return to Cheyenne, on or about 1st of July. Of course, in this case, I should take over ranch when payment is made, about 26th inst. I think it was a great pity you failed to meet me on Saturday through your yachting engagement.

"Yours

"RICHARD FREWEN.

I shall start up north about Friday."

Mr. Frewen having arrived at Cheyenne, on the 10th day of June sent by telegraph to the defendants the following dispatch:

"Dated CHEYENNE, WYO., 10. June 10, 1884.

"To F. PRICE, UNION LEAGUE CLUB—I start north Friday. Will pay at once remaining money, \$26,530, settling for wages and store after my return from ranch, you handing over the bill of sale deposited with Post, and wiring man in charge at ranch to turn over to me. Reply.

"FREWEN."

To which he received the following reply:

"Dated CHICAGO, 11 6-11, 1884.

"To R. FREWELL, CHEYENNE—Impossible to make delivery or settlement now. Will be in Cheyenne, prepared, June 26th. PRICE."

The same day of the receipt of the above, Frewen wrote to the defendants the following letter, which seems to be without date:

"DAKOTA STOCK AND GRAZING COMPANY, LIMITED,
CHEYENNE, WYOMING TERRITORY.

RICHARD FREWEN, MANAGER.

"*Messrs. Price & Jenks, Chicago, Ill.:*

"DEAR SIRs—Your telegram received to-day. I shall be prepared to take over your property in Nebraska, at your ranch, on the 26th inst. and following day.

"Yours faithfully,

"RICHARD FREWEN."

Before leaving Cheyenne for the ranch on Chadron creek, plaintiff's agent left sufficient money in the bank at the former place to pay all the demands of defendants, with a power of attorney and instructions to the cashier of the bank, as attorney of the plaintiff, to pay to the defendants the amount of the last payment on the property upon their assurance that the property would be delivered on the day named in the contract. He then, as we have seen, proceeded to the ranch, for the purpose of "taking over" the property on or before the 26th day of June. I lay considerable stress upon the consideration that both sums of money were payable, and hence the delivery of the property demandable, "on or before" the 26th day of June. But under the strict terms of the contract a legal tender of the \$26,530 would have been unavailing unless the amount of the expense of the herd had also been tendered. This account, as we have seen, had then not been rendered, and its amount and the items composing it were quite unknown to plaintiff or its agent.

While there are some expressions in one or more of the above communications of Mr. Frewen which I do not fully understand, I think his course, as a whole, in respect to this matter, as shown by the bill of exceptions, is characterized by evidence of good faith and fair dealing, as well towards defendants as toward his principal, the plaintiff, and while I impute no bad faith to the defendants, yet

when we consider the peculiar situation of the property, and circumstances of the case, and the magnitude of the interest involved, it must be apparent that they were not anxious to see the transaction fairly and squarely closed up. Again, as we have seen, under the strictest construction of the contract the plaintiff had the right to pay the two sums of money therein specified on any day before the 26th day of June, as well as on that day, and would thereby not only become entitled to the possession of the property, but also to stop the running of the expense account. Therefore when the defendants telegraphed the agent of the plaintiff, on the 11th day of June, that it was impossible to make delivery or settlement then, they repudiated the contract, and this, taken in connection with their failure to deliver the property, and their positive order to their foreman not to deliver it without an order, which they never gave, I think, gave the plaintiff the right to rescind the contract.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

22	112
52	652
54	246

MARTIN W. SPARKS, PLAINTIFF IN ERROR, V. ELISHA J. WILSON, DEFENDANT IN ERROR.

1. **Contract: CONSIDERATION.** A verbal contract upon a sufficient consideration, by which the owner grants a lien upon personal property to another to secure an obligation, is valid between the parties and those having actual notice of the existence of such lien.
2. **Chattel Mortgage: CONSIDERATION.** A purchased a span of horses of B, giving his note therefor, with C and D as sureties.

To induce C to sign the note as surety, A promised to execute a chattel mortgage on said property to C, and further agreed that until the execution of said mortgage C should retain a lien on said property. Afterwards A executed a mortgage to one E, on said property, and soon afterwards left the state without having executed a mortgage to C. D thereupon, in consideration that C would release his claim on the property, executed a chattel mortgage upon other property to secure C against the payment of a part or all of the note held by B. *Held*, That the mortgage from D to C was not without a consideration.

3. ———: ———: QUESTION FOR JURY. Where a mortgage is executed by one co-surety to another, to secure him against a contingent liability as surety, and there is a conflict in the testimony as to the amount to be secured, the question is one for the jury.

ERROR to the district court for Gage county. Tried below before BROADY, J.

Robert S. Bibb, for plaintiff in error.

Pemberton & Bush, for defendant in error.

MAXWELL, CH. J.

This is an action in replevin, brought by the defendant in error against the plaintiff to recover the possession of certain personal property claimed by the plaintiff under a chattel mortgage executed by the defendant.

On the trial of the cause the jury returned a verdict in favor of the defendant in error. The plaintiff thereupon made a motion for a new trial, which motion was overruled and judgment was entered on the verdict.

The principal error relied upon is, that the verdict is contrary to the evidence.

The testimony tends to show that on the 2d day of January, 1884, one Evans executed a note for the sum of \$275, to John J. Sparks; this note was signed by the plaintiff in error and the defendant in error as sureties; it was

due in ten months from date. The note was given for a span of horses purchased by Evans from John J. Sparks. To induce the plaintiff in error to sign said note as surety, Evans agreed to execute a mortgage to him upon said horses, and further agreed that until the execution of said mortgage the plaintiff should retain a lien on said property for the amount of the note. Some time prior to or on the 9th day of January, 1884—the exact date does not appear—Evans and the defendant herein purchased a power corn sheller from the Sandwich Manufacturing Company, at Beatrice. To secure the payment of the purchase price Evans executed a mortgage upon the corn sheller, and also upon the horses purchased from Sparks. On or about the 15th day of January, 1884, Evans being about to execute a mortgage upon the horses in question to the plaintiff, it was discovered that he had previously mortgaged the same to the Sandwich Manufacturing Company. Evans thereupon seems to have left the state. On the 16th of January, 1884, the plaintiff and the defendant went to the office of an attorney in Beatrice, and the mortgage in question was executed by the defendant upon his individual personal property. The consideration for this mortgage was, that the plaintiff should surrender all claim to the horses in question and permit the defendant to take said property and use the same.

In the court below the jury seems to have found that there was no consideration for this mortgage, and that, therefore, the plaintiff could not recover. The testimony is not clear as to whether Evans was in possession of the horses at the time he executed the mortgage to the Sandwich Manufacturing Company, nor is it shown that the mortgage executed by him to said company was superior to the rights of the plaintiff.

As between the parties and those having actual notice, a verbal mortgage is valid, and is only void as to creditors and subsequent purchasers in good faith. *Conchman v. Wright*, 8 Neb., 1.

That the plaintiff had an interest in the property, of which the defendant had actual notice, there is no doubt. The extent of that interest need not be determined, as it does not arise in this case.

There is a conflict in the testimony as to the exact sum guaranteed by this mortgage. The plaintiff contends that the mortgage was given to secure the entire sum of \$275, while the defendant testifies that it was simply intended to secure one-half of the amount due on said note. There being thus a direct conflict on that point, that question must be determined by a jury.

It appears that the plaintiff has paid the note in question, and is entitled to contribution, but except for the mortgage in question, he would have no lien to secure the same. There is testimony in the record from which it appears that the Sandwich Manufacturing Company took possession of said horses under their mortgage, as stated by their attorney, "I think, in February—since I come to think, the horses were kept here in the stable a good while before they were sold, but they were taken shortly afterwards. I may be mistaken as to time, but I know they were kept here until they ate their heads off." The question of a co-surety obtaining possession of the property, therefore, does not enter into the case.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

22	116
24	894
24	826
22	116
26	885
22	116
28	691
22	116
37	621

**FIRST NATIONAL BANK OF TECUMSEH, PLAINTIFF IN
ERROR, V. LEVI OVERMAN, DEFENDANT IN ERROR.**

1. **National Banks: JURISDICTION.** Actions and proceedings against any association under the national banking act may be brought in any state, county, or municipal court, in the county or city in which such association is located, having jurisdiction in similar cases. This applies to a penalty under section 5198 of the United States Rev. Statutes.
2. ———: ———: In such cases the state courts do not exercise a new jurisdiction conferred upon them, but their ordinary jurisdiction derived from their constitution under the state law. *Clafin v. Houseman*, 93 U. S., 130.

ERROR to the district court for Johnson county. Tried below before BROADY, J.

T. Appleget & Son, for plaintiff in error.

Daniel F. Osgood, for defendant in error.

MAXWELL, CH. J.

The defendant in error brought an action in the district court of Johnson county, against the plaintiff in error, under Sec. 5198 of the Revised Statutes of the United States, to recover one hundred dollars as a penalty under said section. The plaintiff in error demurred to the petition upon two grounds. First. That the court did not have jurisdiction of the subject-matter. Second. That the petition did not state facts sufficient to constitute a cause of action. The demurrer was overruled and judgment for one hundred dollars rendered in favor of the defendant in error. The only error assigned in this court is the want of jurisdiction of the trial court.

Section 5198 of the Revised Statutes of the United States provides, "That suits, actions, and proceedings against any

association under this title may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, and in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases."

This section removes the impediment to the exercise of jurisdiction, created by the act of 1789 [United States Revised Statutes, Sec. 711], and expressly confers jurisdiction on the state courts, as above specified, concurrent with the Federal courts in "suits, actions, and proceedings against any association under the banking act."

The statutes of the United States extend over every state, as a part of its laws, and although exclusive jurisdiction may be given to the Federal courts, yet if it is not so given, either expressly or by necessary implication, the state courts, having competent jurisdiction in other respects, may be resorted to. *Hade v. Mc Vay*, 31 O. S., 236. *Kinsen v. Farmers National Bank*, 13 N. W. R., 59. *Ordiway v. Central National Bank of Baltimore*, 47 Md., 217. S. C., 28 Am. Rep., 455. *Clafin v. Houseman*, 93 U. S., 130. *Gruber v. First National Bank*, 19 Ala. L. J., 137. *Picketts v. Merchants National Bank of Memphis*, 32 Ark., 346. *Dow v. Irasburg National Bank of Orleans*, 50 Vt., 112. S. C., 28 Am. Rep., 493. *Bletz v. Col. National Bank*, 87 Pa. St., 87. 30 Am. Rep., 343.

Authority is therefore expressly conferred on the state courts having jurisdiction in similar cases.

It is very strenuously contended on behalf of the plaintiff in error that congress cannot impose duties on the state courts, and that therefore they had no authority to act in the premises. But congress has not sought to compel the state courts to act in a case like that under consideration, nor has it sought to impose duties upon them. It simply confers the authority; in effect permits them to hear and determine such cases, but without compulsion. 1 Kent's

Com., 400. The state courts do not exercise a new jurisdiction conferred upon them, but their ordinary jurisdiction derived from their constitution under the state law. *Clafin v. Houseman*, 93 U. S., 130. The state tribunals, therefore, have jurisdiction. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

22	118
29	451
22	118
37	587
22	118
53	722

THE STATE OF NEBRASKA, EX REL. ABBY GARDNER, V.
EDWARD P. ROGGEN ET AL.

1. **Internal Improvements: PROPOSITION TO VOTE BONDS.** A proposition submitted to the voters of a county in which it is proposed to vote the bonds of such county to a railroad company must designate the donee. A proposition in the alternative, to issue to a certain corporation named or to another designated corporation, is ineffectual to authorize the issuing of bonds, even if adopted by the legal voters.
2. ———: **CERTIFICATE ON BONDS.** Bonds issued by a county as a donation to a railroad company are invalid unless they have endorsed thereon a certificate, signed by the secretary and auditor of state, showing that they were issued pursuant to law.

ORIGINAL application for mandamus.

J. R. Gilkerson, G. M. Lambertson, and J. M. Woolworth, for relator.

J. C. Cowin, for respondent.

MAXWELL, CH. J.

This is an application for a mandamus to compel the defendants to certify the following bond alleged to have been

issued by the proper authorities of Butler county. The bond is in the words and figures following:

"No. 3. UNITED STATES OF AMERICA, \$500.
"STATE OF NEBRASKA, COUNTY OF BUTLER.
"RAILROAD BOND.

"Know all men by these presents: That the county of Butler, in the state of Nebraska, acknowledges itself indebted and justly bound to pay, and promises to pay to the Lincoln and Northwestern Railroad Company, or bearer, the sum of five hundred dollars, lawful money of the United States of America, at the office of the county treasurer of Butler county, twenty years from the date hereof, with interest from July 1st, 1879, at the rate of eight per cent per annum, payable annually on the first day of July in each year, from and after the date hereof, on the presentation and surrender, as they fall due, of the interest coupon notes annexed.

"This bond is one of a series of one hundred and six bonds of like tenor and date, amounting in the aggregate to fifty-three thousand dollars, executed and issued to the Lincoln and Northwestern Railroad Company, or bearer, as a donation made by said county to aid in the construction and completion of a railroad from a point on the south line of Butler county, running thence to a point on the north line of said county, *via* Ulysses and David City.

"This bond is authorized by more than a two-thirds vote of the legal voters of said county, voting at an election legally called and held under and by virtue of an order of the county commissioners of said county, dated on the 1st day of May, A.D. 1879, and in pursuance of an act to enable counties, cities, and precincts to borrow money on their bonds to aid in the construction of works of internal improvement in this state, and to legalize bonds already issued for such purpose, passed February 15th, 1869, and the resolution of the board of county commissioners,

and a two-thirds vote of the electors of Butler county, at an election legally called and held for that purpose.

"In witness whereof, the said Butler county has caused this bond to be signed in its behalf by the chairman of the county commissioners of said county, attested by the clerk, and the seal of said county to be affixed, at the office of the county clerk in the county of Butler, state of Nebraska, this first day of July, A.D. 1879.

"B. F. ROLPH,

"*County Clerk.*

[SEAL.]

"ADAM HALL,

"*Chairman County Commissioners.*"

The proposition under which the bond was issued was as follows:

"PROPOSITION FOR RAILROAD BONDS AND TAX.

"By virtue of authority in us vested by an act of the legislature of the state of Nebraska, entitled "An act to enable counties, cities, and precincts to borrow money on their bonds to aid in the construction or completion of works of internal improvement in this state, and to legalize bonds already issued for such purposes," approved February 15, 1869, and the acts of the legislature of said state amendatory thereof, we, the county commissioners of Butler county, in the state of Nebraska, for the purpose of aiding the construction of a railroad from some point on the south line of said county to a point on the north line of said county via Ulysses and David City, do hereby submit to the legal voters of said county of Butler, to be voted upon by them at a special election, which is hereby called to be held on the 5th day of June, A.D. 1879, at the usual places of voting in the several precincts of said county, the following propositions or questions, that is to say:

"Shall the county commissioners of Butler county, in the state of Nebraska, be authorized to issue and give to

the Lincoln & Northwestern Railroad Company, or the Blue Valley & Northwestern Railroad Company, fifty-three thousand dollars of the coupon bonds of Butler county, to be dated the 1st day of July, A.D. 1879, bearing interest from date at the rate of eight per cent per annum, the interest payable annually at the office of the county treasurer of said county of Butler, and the principal to become due and payable in twenty years from the date of said bonds; and, in addition to the usual taxes, shall the proper officers be authorized to levy a special tax on all the taxable property within said county sufficient to pay the annual interest on said bonds as the same shall become due, and after the expiration of ten years from the date of said bonds shall the proper officers be authorized to levy a tax in like manner upon all the taxable property within said county in addition to all other taxes sufficient in amount to create a sinking fund for the purpose of paying at maturity the principal of said bonds. The whole amount of said bonds to be issued and given to one of the aforesaid companies upon the following conditions and none other. That one of the said railroad companies shall construct, maintain, and operate a railroad of the standard gauge from some point on the south line of the said county of Butler in the valley of the Blue river, running thence north-east via the town of Ulysses to David City, thence north-east to the north line of said county of Butler, and shall also locate and establish and maintain a freight and passenger station or depot within the distance of a half of a mile of the public square of the town of Ulysses, and shall also locate and establish and maintain a freight and passenger depot within the distance of one-fourth of a mile of the public square in David City. Said railroad shall be completed to the extent to have regular daily trains running thereon to David City by the first day of April, A.D. 1880, and shall be completed to the same extent to the north line of said county by the first day of June,

1880. All of said bonds shall be issued on the first day of July, A.D. 1879, or as soon thereafter as practicable, and shall be placed in the hands of a disinterested person as trustee, said trustee to be agreed upon by the commissioners of said county and the railroad company aforesaid which shall build the line of railroad aforesaid, and shall be delivered by said trustee to either of the said railroad companies above named, which shall construct said road, as follows, to-wit: thirty-three thousand dollars of such county bonds shall be delivered by said trustee when the line of railroad aforesaid shall be constructed and completed and trains running thereon to David City, and twenty thousand dollars of such county bonds shall be delivered by said trustee when said railroad shall be constructed and completed and trains running thereon to the north line of Butler county.

“The said commissioners shall not be authorized to issue the bonds aforesaid unless one of the railroad companies above named shall, on or before the first day of July, 1879, file in the office of the county clerk of said county its acceptance in writing of the bonds herein provided for, should the same be authorized to be issued by the legal voters of said county, and the company so filing its acceptance shall be entitled to have said bonds issued to it and placed in the hands of a trustee as above provided, and to be delivered by said trustee to said company upon its compliance with the conditions aforesaid. In the event of either of the said railroad companies shall fail to build the line of railroad above specified, within the time aforesaid, then and in that case such bonds shall be returned by the trustee to the county commissioners of said county and said bonds shall be canceled. At the time of delivery of said bonds to the company building said railroad, enough coupons shall be detached therefrom so that said bonds shall only draw interest from the day the said company shall be entitled to the same, and the coupons so detached shall be

returned by said trustee to the county commissioners of said county for cancellation.

"The vote to be had and taken on the foregoing proposition shall be by ballot and the ballots cast at said election shall have written or printed thereon the following:

"For Railroad Bonds and Tax, Yes.

"For Railroad Bonds and Tax, No.

"If two-thirds or more of the ballots cast at said election shall have written or printed thereon the words "For railroad bonds and tax, yes," then said county commissioners shall be authorized and empowered to issue bonds as aforesaid."

Section II., article XII. of the constitution, provides that, "No bonds or evidence of indebtedness issued by a city or county as a donation to a railroad or other works of internal improvement shall be valid unless the same shall have endorsed thereon a certificate signed by the secretary and auditor of the state, showing that such bonds are *issued pursuant to law*."

The bond in question seems to have been sold without the certificate above required having been endorsed thereon. The plaintiff claims to be an innocent purchaser of such bond and to have paid full value therefor, and the testimony shows that she had no actual knowledge of the constitutional requirement above copied, when she purchased said bond. The first question presented is, whether the bond in question was issued pursuant to law? It will be observed that the proposition which it is claimed authorized the issuance of this and the other like bonds was, "Shall the county commissioners of Butler county in the state of Nebraska be authorized to issue and give to the Lincoln and Northwestern Railroad Company or the Blue Valley and Northwestern Railroad Company fifty-three thousand dollars of the county bonds of Butler county?" Also, that "the whole amount of said bonds to be issued and given to one of the aforesaid railroad companies upon the following conditions and none other: That one of said rail-

road companies shall construct, maintain, and operate a railroad of the standard gauge from some point on the south line of the said county of Butler in the valley of the Blue river, running thence north-east via the town of Ulysses to David City, thence north-west to the north line of said county of Butler," etc.

The proposition is in the alternative, and in the same form as in *Jones v. Hurlburt*, 13 Neb., 125. In that case Judge Cobb, in delivering the opinion of the court, says, pp. 136-7: "The language of our constitution is: 'No city, county, town, precinct, municipality, or other subdivision of the state, shall ever make donations to any railroad or other works of internal improvement, unless a proposition so to do shall have been first submitted to the qualified electors thereof at an election by authority of law.' There cannot be a donation without a donee, and there can be no doubt of this proposition, that a grant to two persons or corporations in the alternative is insufficient to pass title in the thing granted, unless there is power somewhere to elect between such two persons or corporations as to which shall receive it. Here is a donation, in terms, to 'the Lincoln and Northwestern Railroad Company or the Blue Valley and Northwestern Railroad Company.' Who has the power to choose between these two corporations? Certainly not the county commissioners, for, as in the New Hampshire case [*Peterborough Railroad v. Peterborough*, 49 N. H., 281], the voters of the precinct could no more delegate this power to the county commissioners than they could the power to make the donation in the first instance. Indeed, in the case at bar there is no claim that power to designate which one of these corporations shall be the recipient of this donation has been delegated to or lodged in any one. The voters certainly have not designated who shall be the donee of their bounty, and hence the conclusion is irresistible that the grant remains imperfect and abortive for the want of a specific and certain grantee."

In *Spurck v. L. & N. W. R. R. Company*, 14 Neb., 293, which was an action to enjoin the defendant from registering the bond in question with others of like character, it was held that under our law public donations to aid in the building of railroads can be made only by the people themselves by means of an election properly called and held, and that the people cannot delegate to the county commissioners the authority to determine which of two companies shall be the recipient of aid voted. These cases, in our view, state the law correctly, and there being no donee named in the proposition, the election was ineffectual to authorize the issuing of the bond in question and others of like character. The relator contends that the donation was to the *work* and not to a railroad company, but an examination of the proposition will show that this position is incorrect.

2. Our constitution requires bonds issued by a city or county as a donation to a railroad to have a certificate from the auditor and secretary of state endorsed thereon that such bonds were issued pursuant to law. This is an imperative requirement, without which the bonds are incomplete on their face, and a purchaser thereof is not protected. The constitution, in effect, declares that bonds not certified shall be invalid and of no effect. *State v. Babcock*, 19 Neb., 223. *State v. Babcock*, Id., 230. The object of this provision was to prevent the fraudulent and surreptitious issuing of bonds, and placing them on the market, and while the certificate does not have a conclusive effect as against the municipality issuing the bonds so as to prevent proof of their invalidity, yet such bonds are not complete on their face until so certified. It follows that the bonds being incomplete, the plaintiff is not protected as an innocent purchaser. The writ is therefore denied and the proceeding dismissed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

WHITE LAKE LUMBER COMPANY, APPELLEE, v. JAMES
D. RUSSELL, APPELLANT.

1. **Mechanic's Lien: CONSTRUCTION OF STATUTE.** The lien of mechanics and material men upon a building or improvement in the construction of which labor or material is used, exists alone by virtue of the statutes creating it. Such statutes are remedial, and must be liberally construed.
2. ———: **DESCRIPTION OF PROPERTY.** An affidavit for a mechanic's lien, which describes the improvement as situated upon the south-west corner of lots four, five, and six, in a specified block in a city or village, and giving the name of the owner, would be sufficient, under chapter fifty-four of the Compiled Statutes, as to the description of the property sought to be affected by the lien.
3. ———: ———. The fact that an affidavit for mechanic's lien contains a description of more land than will be subject to the lien will not render the proceeding void, if not done with a fraudulent intent.
4. ———: **IMPROVEMENT ON PROPERTY.** Where it was alleged in the affidavit that the lumber was sold to H. E. B. for C. E. B., the owner of the property, and it was shown upon the trial to the satisfaction of the court that the material was furnished for the express purpose of making an improvement upon the property of C. E. B., these facts will support a finding that the material was sold upon a contract, to be used in the improvement named.

APPEAL from Johnson county. Tried below before
BROADY, J.

Daniel F. Osgood, for appellant.

S. P. Davidson, for appellee.

REESE J.

This action was instituted in the district court for the purpose of foreclosing a mechanic's lien against the property of one Clara E. Bidwell, who was the owner of the

22 126
37 221

22 126
38 618

22 126
56 618

real estate upon which the improvements were made. Appellant Russell, by leave of court, became a party to the action, and by his answer denied the allegation of plaintiff's petition, and sought the foreclosure of a mortgage held by him upon the premises in question, and bearing date subsequent to that of the alleged lien of plaintiff. He insists that plaintiff has no lien; by reason of a failure to comply with the law in the filing of the affidavit in the clerk's office, and for the further reason that it was not proven upon the trial that the lumber, from the sale of which the indebtedness arose, was sold to Clara E. Bidwell, the owner of the property; but that it was shown that it was sold to Henry E. Bidwell, her father, upon his credit alone, and that there never was a contract, either express or implied, with her for the furnishing of the material mentioned in the affidavit.

The first question which we will notice is, as to the sufficiency of the affidavit filed in the office of the county clerk. This affidavit is as follows :

" STATE OF NEBRASKA, }
JOHNSON COUNTY. }

" After being duly sworn according to law, H. I. McCoy, agent of The White Lumber Company, at Sterling, Johnson county, Nebraska, deposes and says that the above bill is a true copy of his books, with proper credits; that the above named items were sold and delivered to H. E. Bidwell, for Clara E. Bidwell, at his request, at times mentioned, and that the material herein named was used in building, re-modeling, and repairing the building or barn owned by said Clara E. Bidwell, and situated on the south-west corner of lots four, five, and six, in block six, in the original town of Sterling; and converting the same into a building used for school purposes. That the balance due is unpaid, and said White Lake Lumber Company, for the better securing of same, hereby files this bill with intention of a mechanic's lien, and wishes it to be properly indexed and so filed."

This affidavit is properly verified, and attached to it is an itemized statement of the account. The objection to it is that the property upon which the lien is sought to be created is not described with sufficient particularity.

In the consideration of this part of the case it must not be forgotten that the lien of mechanics and material men upon a building or improvement in the construction of which labor or material is used, is purely a creature of the statutes, and did not exist either at common law or in equity (Maxwell's Pleading and Practice, 700), and must, therefore, be considered with reference to the statute, as well in the manner of its enforcement as in its creation.

Section 3 of the mechanic's lien law of this state (Comp. Stat., Chap. 54, Sec. 3) provides that any person entitled to a lien under the chapter "shall make an account in writing of the items of labor, skill, machinery furnished, or either of them, as the case may be, and after making oath thereto, shall, within four months of the time of performing such labor and skill, or furnishing such machinery or material, file the same in the county clerk's office of the county in which such labor, skill, and materials shall have been furnished, which account so made and filed shall be recorded in a separate book to be provided by the clerk for that purpose, and shall, from the commencement of such labor or the furnishing of such materials, for two years after the filing of such lien, operate as a lien on the several descriptions of such structures and buildings and the lots on which they stand," etc.

By this section it will be seen that in order to secure a lien it is necessary to file a statement of the account, properly verified, with the county clerk, and cause the same to be recorded. Whether or not it was the purpose of the legislature to make the lien effective without any description of the real estate sought to be affected, but that the lien should be in the nature of that imposed by a judgment, limited to the particular tract or lot upon which the im-

provement is made, we need not now inquire, as the affidavit in this case refers to the property sufficiently to apprise all persons of the location of the building thereon, and therefore of the property sought to be held. The language of the affidavit is, that the material was used in the rebuilding, etc., of "the building or barn owned by said Clara E. Bidwell, and situated on the south-west corner of lots four, five, and six," in the block specified. The building standing upon the corner of the lots named, if they constitute a compact body of land and were owned by Clara E. Bidwell, would be sufficient of itself to charge third parties with knowledge of plaintiff's rights for the term of four months without any notice, in the form of the verified account, being filed in the office of the county clerk. As to whether or not she did own the property, or whether it was contiguous, was a question of proof upon issue joined.

Statutes governing mechanic's liens are remedial and must be liberally construed. *Rogers v. Omaha Hotel Co.*, 4 Neb., 59.

In Phillips on Mechanics' Liens, Sec. 379, it is said that probably the best rule to be adopted is, "that if there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, it will be sufficient. There is great reluctance to set aside a mechanic's lien merely for loose description, as the acts generally contemplate that the claimants should prepare their own papers; and it is not necessary that the description should be either full or precise. It is enough that the description points out and indicates the premises so that by applying it to the land it can be found and identified."

The affidavit describes the property upon which the building stands with particularity, and states that the location or site of said building is the south-west corner. If Clara E. Bidwell was the owner of the three lots named, and they were used as one property, they would be within

the meaning of "lot of land," as used in section one of the chapter of the statutes under consideration. The petition alleges that Clara E. Bidwell, at the time the material was furnished, was the owner of the south half of the lots described, and the lien is only asked as against that part. The fact that the affidavit described too much land will not render it void if not done fraudulently or designedly. *Oster v. Rabeneau*, 46 Mo., 596. *Whitenack v. Noe*, 3 Stockton's Ch. (N. J.), 321. The lien will be held good upon whatever property belongs to the lot and curtilage and is necessary to the enjoyment of the premises, which is a question of fact. *Edwards v. Derickson*, 4 Dutcher (N. J.), 39. There is a very marked difference between a *misdescription* of the land and a vague one. If other and different property is described in an affidavit from that upon which the improvement is made, it might be a fatal variance, while an imperfect description might not affect the legality of the proceedings.

As to the second contention of appellant, it must be sufficient to say that the testimony of plaintiff's agent is, that he was well acquainted with the property on which the improvement was to be made, and that the lumber was purchased for that express purpose, and it was so used. The contract was made with Henry E. Bidwell, who was, without doubt, acting for his daughter. There was sufficient proof of these facts to sustain the finding of the trial court.

It is true that the preliminary proceedings taken for the purpose of establishing the lien were somewhat informal, but they were not void. The proof was sufficient to sustain the finding of the court upon the issue that Henry E. Bidwell purchased the lumber "for Clara E. Bidwell," as stated in the affidavit, and if so he was her agent.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

WILLIAM J. DAWSON, GEORGE T. DAWSON, AND FANNIE M. DAWSON, APPELLANTS, v. ELEANOR J. McFADDIN, FORMERLY ELEANOR J. DAWSON, AND T. JAMES McFADDIN, HER HUSBAND, APPELLEES.

22	131
96	721
23	131
31	524
22	131
43	845

Equity protects a parol gift of land equally with a parol agreement to sell it, if accompanied by possession, and the donee, induced by the promise to give it, has made valuable improvements on the property. *Neale v. Neale*, 9 Wall., 1.

APPEAL from the district court for Johnson county.
Heard below before BROADY, J.

S. P. Davidson, for appellants.

T. Appleget & Son, for appellees.

COBB, J.

This cause comes upon appeal from the district court of Johnson county. The following statement of the case I adopt from the brief of appellants as entirely fair and sufficiently full for the purpose of this opinion:

"On February 5th, 1885, the plaintiffs filed their petition, alleging that on or about January 11th, 1881, defendant Eleanor J. McFaddin, then Eleanor J. Dawson, held and controlled divers large sums of money and other property in which plaintiffs owned large interests, and for the purpose of distributing to plaintiffs a portion of the property aforesaid belonging to them or in which they were interested, and in payment of services performed by plaintiffs for defendant at her request, defendant purchased the east half of the north-west quarter and the east half of the south-west quarter of section 25 in township 5 north, of range 9 east, in Johnson county, Nebraska, and paid for it out of the said money and property so belonging to plaintiff-

iffs, and at the same time agreed to convey the same to said William J. Dawson, for himself and his co-plaintiffs, as soon as he became of age, and on the day last aforesaid said defendant delivered possession of said land to plaintiff William J. Dawson, for himself and his co-plaintiffs, in pursuance of said agreement, and they have remained in exclusive possession thereof ever since. Said plaintiffs have punctually and strictly done and performed all and singular the agreements and undertakings on their part to be kept and performed; and have carefully cared for and guarded and improved said land by virtue and in pursuance of said agreement. Plaintiffs aver that when said land was so purchased by defendant, it was so purchased for the use and benefit of plaintiffs, or two of them, and being brothers and sister they have agreed to share the same equally, and they are the real owners of said land, while defendant holds the bare legal title for the purpose aforesaid. Defendant T. James McFaddin has since married defendant Eleanor J. McFaddin, well knowing all the above facts. Plaintiff William J. Dawson became of age May 7th, 1881, and George T. Dawson became of age April 5th, 1884, and Fannie M. Dawson became of age December 9th, 1884. Plaintiffs have frequently requested defendants to execute and deliver the deed conveying said land to them, which defendants have heretofore refused and still do refuse to do. Plaintiffs are entirely without remedy unless this court will take cognizance of this whole matter, and grant relief. Plaintiffs pray that defendants be enjoined from prosecuting any suits to oust them from said land and from molesting plaintiffs in the use and occupancy thereof. That defendants be required to specifically perform their above mentioned agreement, and execute and deliver a good and sufficient warranty deed conveying said land to plaintiffs, and in default of compliance with said requirement that the decree of court operate as such conveyance; and that plaintiffs may have general relief.

Dawson v. McFaddin.

"Defendant Eleanor J. McFaddin, on the 18th day of November, 1885, filed her answer, in which she alleges that she agreed to convey the said land only when herself and other creditors of one Ralph Dawson were paid the claims they held against him, and that said claims have not been paid. Also that the notice to quit said premises and the threat to oust plaintiffs were not in violation of any agreement between plaintiffs and defendants. The balance of said answer consists wholly of specific denials of the other allegations of the petition, and the prayer of the answer is only that defendants may go hence without day.

"Plaintiff's reply denies each and every allegation in said answer contained.

"The cause was tried at the November term, 1886.

"The court found that there was no sufficient contract upon which equity would compel specific performance, but under assurance to plaintiffs by defendant that she would let them have the land, and on the faith thereof, plaintiffs put on the land improvements of the value of \$1,100, and that plaintiffs have received rents and profits therefrom to the amount of \$400, leaving a balance on the land for said improvements of \$700, which the court finds is an equitable lien on the land described in the petition, which defendant shall pay, as doing equity before getting affirmative action of the court to do her equity, and upon doing which the title to the land will be perfected in her and a writ of possession awarded to put her in possession of said land. Upon default of her paying said \$700 and interest from this date, within 90 days from this date, plaintiffs shall remain in possession of said land until said amount and interest shall have been paid by the rents and profits thereof and that each party pay one-half of the costs herein. Decree was entered in pursuance of said findings, and plaintiffs appealed."

The evidence in the case, as presented to this court by the bill of exceptions, is not as clear in all respects as might

be desired. But from its careful examination the following facts may be gathered as sufficiently proved. The plaintiffs and female defendant are brothers and sisters, the latter much older than the former. Some time prior to the year 1879, the parties, as well as their father, Ralph Dawson, and their mother, resided in the city of Brooklyn, New York, at which place and the city of New York the said Ralph Dawson was the owner of a large amount of valuable and productive real property. He was at the same time largely indebted, and probably otherwise involved. This property in New York and Brooklyn, the said Ralph Dawson conveyed to and placed in the possession of the defendant, Eleanor J., his daughter, as he expressed it when on the stand as a witness for her, "to pay my debts, for fear of the foreclosure of mortgages, and to try and get them put off a little while until she could try and sell them and pay off." He also adds in the same sentence, "and she sold by degrees and paid off." It was during the existence of this trust that the defendant, Eleanor J., bought the land in question and placed the plaintiffs, or some of them, in possession of it. It was probably the theory upon which this action was commenced that the lands having been bought with this trust fund for the younger children of Ralph Dawson, the real owner of the fund, although the title was taken in the name of Eleanor J., a trust therein would result in favor of said younger children, which a court of equity would enforce. The evidence no doubt would sustain that theory, were the father and owner of the trust fund deceased without disposing thereof by will or otherwise, but in the absence of that circumstance there is a want of evidence of either legal or equitable title to the trust fund in the plaintiffs sufficient for the enforcement of the claim of the plaintiffs as a trust. But the evidence does prove that while the defendant, Eleanor J., was in possession of the said fund, and claiming the right to dispose of it as she pleased, she bought the land in question and made a gift of it to the plaintiffs.

Whether she paid for it out of the trust fund or otherwise, is not clearly proved, nor is it material to the present view of the case. In acceptance of the said gift, and not discriminating very closely or caring much whether it came from the funds of their father or means acquired from other sources by their sister, the two male plaintiffs entered into the possession of the land and made valuable permanent improvements thereon, claimed by them on oath to be of the value of fifteen hundred dollars, and found by the court below to be of the value of eleven hundred dollars.

The land in question was owned by a foreign insurance company. The agent who sold the same to defendant testified that while they were agreeing upon the terms of the sale, she said that she was "buying it for Willie," or "for the boys." George Dawson, one of the plaintiffs, testified that soon after the purchase of the land by his sister she said to him, "I bought this quarter for you to go to work on, and work and take care of it, and improve it, and when you get of age I will give the deed of this quarter," and again, "she says go on and improve that land and take care of it," etc. William J. Dawson, one of the plaintiffs, testified that when defendant came from the office after purchasing the land, she said "she had bought a farm for me and we were to live together agreeably until such time as my brother came of age, and that when he came of age she would make a division, and give George and Fannie the upper quarter and me the lower quarter," and again, "we were to go on there and work it till such time as George came of age * * * we were to go on improving it, and the proceeds we were to have for spending money, and when it came such time as we came of age, she would give us a deed, and if it did not suit us, we were to sell out both farms and come to town to live, the same as we did in New York." Four letters of defendant to William J., the elder of the plaintiffs, dated respectively May 18th,

1880, February 20th, 1882, February 22d, and January 29th, were placed in evidence. They fairly corroborate the testimony of the plaintiffs, and clearly recognize the land in question as the land of the plaintiffs. These letters she utterly failed to explain, when on the stand as a witness in her own behalf, although her attention was directed thereto.

Ellis Parrish, William Snyder, and Mrs. Margaret Snyder, disinterested witnesses residing in the neighborhood of the premises, testified to conversations with defendant, Eleanor J., about the time of the purchase of the land, in which she stated that the land was bought for the boys, meaning the plaintiffs.

On the other hand, the defendant, Eleanor J., testified to a general denial of having contracted or given the land to plaintiffs. Ralph Dawson testified that plaintiffs had no interest in the fund placed by him in the hands of his daughter, the defendant.

The evidence in the case, therefore, I think, overwhelmingly proves that the defendant, in whom the legal title to the land is vested, when she purchased it, or soon thereafter, made a gift of it to the plaintiffs, on condition that they would go on and occupy and improve the land, and promised that as soon as the younger of them arrived of age, she would deed the land to them. Of the fact that they took possession of the land at that time, pursuant to and relying upon said gift and promise to convey the same by defendant, and retained it ever since, and have made the improvements thereon hereinbefore referred to, there is no dispute.

As to the cases in which courts of equity will enforce the specific performance of parol gifts of real property, there are doubtless a great conflict of the authorities. I am inclined, however, in the midst of this conflict, to follow the rule laid down by the supreme court of the United States in the case of *Neale v. Neale*, 9 Wall., 1, in the fol-

lowing language: "And equity protects a parol gift of land equally with a parol agreement to sell it, if accompanied by possession, and the donee, induced by the promise to give it, has made valuable improvements on the property." The court adds: "And this is particularly true where the donor stipulates that the expenditure shall be made, and by doing this makes it the consideration or condition of the gift."

In the case of *Gwynn v. McCauley*, 32 Ark., 97, the court thus states the law (I quote from the syllabus): "Chancery will not decree specific performance of a mere voluntary agreement. But when a donee enters into possession and makes improvements on the land, the money thus expended on the faith of the gift is a consideration on which to ground a claim for specific performance."

Pomeroy in his work on Contracts, after stating the law to be that, "The making of valuable improvements by a donee in possession is regarded by courts of equity as furnishing a sufficient ground for decreeing a specific execution of a parol gift of land," etc., says: "Slight and temporary improvements, or trivial outlays, however, do not raise an equity in favor of the donee to have the gift enforced, nor does the court grant its specific remedy when the expenditure was not made in consequence of the gift; nor, it seems, when the donee has been compensated for his outlays by the rents and profits already received from the land. The gift must be established by certain and unmistakable evidence, and the fact that the improvements were made in consequence of, and in reliance upon it, must be directly and unequivocally proved." See pp. 184-5, and 6, and cases cited. With the above qualifications and exceptions, it seems to be the doctrine of all the text-books, and most of the leading cases, that a donee in possession, and who has made valuable improvements upon the land, will receive the same protection as a purchaser for a valuable consideration where there has been a part performance of the contract.

In the case of *Jones v. Tyler*, 6 Mich., 363, it was held that, "In such a case a conveyance would be decreed only on the most satisfactory proof of the gift, and of some satisfactory reason why it was not consummated by a conveyance." In the case at bar, the reason given why the gift was not consummated by a conveyance is, that the donees were infants. While this was probably not a sufficient reason, it is evident from the bill of exceptions that it was so considered by the donor, and that such consideration controlled her action.

The judgment of the district court is reversed, and a decree of specific performance will be entered in this court requiring the defendants to convey the land described in the pleadings to the plaintiffs, and that upon their failure to make and deliver such conveyance for the term of ninety days from the filing of this opinion, the said decree to stand as a conveyance thereof.

DECREE ACCORDINGLY.

THE other judges concur.

22	138
41	232
22	138
42	715

WILLIAM LAMB, PLAINTIFF IN ERROR, v. BENJAMIN B. BRIGGS, DEFENDANT IN ERROR.

1. **Negotiable Instruments: GUARANTY: ALTERATION.** One B. sold to D. thirty-six head of ponies for the sum of \$900, and took his note therefor, due in sixty days. B. insisting upon cash or a guaranty of the note, an arrangement was made with one L., a banker, who executed a receipt and guaranty as follows:

Received of B. B. Briggs the following described note for collection: John J. Dunbar, July 28, 1879, \$900, Sept. 28, 1879, and guarantee the payment of said note.

—B. B. BRIGGS,—
WM. LAMB.

Lamb v. Briggs.

Upon an answer alleging the alteration of the guaranty by the erasure of the name of Briggs after execution and delivery of the guaranty by Lamb, *Held*, That the question must be submitted to the jury, and it was the duty of the jury to answer special interrogatories submitted to them relating to such alleged alteration.

2. ———: ———: **CONSIDERATION.** Where one L. guaranteed the note of D., in consequence of which one B. delivered certain personal property to D., *Held*, A sufficient consideration for the guaranty.
3. ———: ———: **EVIDENCE.** A guarantor who has testified in an action on the note by the payee against the maker may, in an action by the payee against such guarantor, be asked on cross-examination if on the former trial he had not testified to certain facts, stating them, and his admission that he so testified will render it unnecessary to introduce proof of such testimony. But if proof that the witness so testified is afterward introduced, ordinarily it will be error without prejudice.
4. **Trial: VERDICT.** Section 295 of the code provides that, "When by the verdict either party is entitled to recover money of the adverse party, the jury in their verdict must assess the amount of recovery." A general verdict, therefore, in favor of a guarantor will not authorize a judgment against him based on a special finding of the jury that a specified sum was due the payee from the maker of the note, there being a dispute as to whether the guaranty of L. was jointly with B. or for the whole amount.

ERROR to the district court for Gage county. Tried below before BROADY, J.

Griggs & Rinaker, for plaintiff in error.

Pemberton & Bush, for defendant in error.

MAXWELL, CH. J.

This action was brought in the district court of Gage county upon the following instruments:

"\$900. BEATRICE, NEB., July 28, 1879.

"Sixty days after date I promise to pay to the order of B. B. Briggs nine hundred dollars, at the office of Smith Bros., bankers. Value received.

"JOHN J. DUNBAR."

"BEATRICE, NEB., July 29, 1879.

"Received of B. B. Briggs the following described note for collection : John J. Dunbar, July 28, 1879, \$900 Sep. 28, 1879, and guarantee the payment of said note.

~~"B. B. Briggs,~~

"WM. LAMB."

The defendant below, plaintiff in error, in his answer says : That he admits that he signed his name to the instrument upon which plaintiff's action is brought, but that at the time defendant signed his name thereto the said plaintiff also subscribed his name to said instrument ; that after said instrument had so been signed by plaintiff and defendant, the said plaintiff took the said instrument, and has ever since the said time had the possession thereof ; that after the said instrument had been so taken by the said plaintiff, he, the said plaintiff, fraudulently altered the said instrument by erasing therefrom the name of him, the said plaintiff ; that the said alteration was made by the said plaintiff, without the knowledge or consent of defendant ; that the said instrument set forth in plaintiff's petition and sued upon in this action is not the same instrument made and signed by this defendant as aforesaid, but is another and different instrument, and was not made, signed, and delivered by defendant, is not the instrument of the defendant, and is not binding upon the defendant.

Second defense. That he admits that he signed his name to the instrument upon which plaintiff's action is brought, but at the time defendant signed his name thereto the said plaintiff also signed his name to the said instrument ; that at the time said plaintiff took possession of the said instrument the names of both plaintiff and defendant were signed thereto ; that the said plaintiff subsequent to said time fraudulently altered the said instrument by erasing the name of him, the said plaintiff, therefrom ; that the said alteration was made without the knowledge or consent of the defendant ; that the defendant denies that there was any consideration whatever for his signing his name to the

Lamb v. Briggs.

said instrument; that he alleges that there was no consideration whatever for his signing his name to the said instrument; that he alleges that the said instrument was signed on a day subsequent to the making, executing, and delivering of the promissory note mentioned therein; that the said instrument is without consideration and void; and that the defendant denies each and every allegation in plaintiff's petition contained not hereinbefore specifically admitted."

To this answer the plaintiff below, defendant in error, filed a reply; denying all the facts contained therein.

On the trial of the cause the court submitted certain interrogatories to the jury, as follows:

"1. Did plaintiff sign his name to the guaranty by inadvertence? Answer." Defendant excepts.

"2. Did plaintiff sign his name to the guaranty sued on with Mr. Lamb, the defendant, with the intent to become co-guarantor jointly with the defendant? Answer." Defendant excepts.

"3. Was the signing of the guaranty by defendant any part of the consideration inducing the plaintiff to part with the horses which he turned over to Emery? Answer. Yes." Defendant excepts.

"4. Was the note described in the petition left by plaintiff with defendant for collection under defendant's exclusive control at the time of the signing of the guaranty by defendant and as part of the same transaction, and was that any part of the consideration inducing Lamb to sign the guaranty? Answer. Yes." Defendant excepts.

"5. How much is now due to plaintiff from John J. Dunbar on the note described in the petition? Answer. \$1,320.30." Defendant excepts.

"6. Did plaintiff Briggs erase his name from the guaranty sued on with any fraudulent intent or for any dishonest purpose? Answer." Defendant excepts.

"R. J. CULLY,
"Foreman."

It will be observed that a number of interrogatories were not answered by the jury, and this is now assigned for error. The jury also returned the following general verdict :

"BENJAMIN B. BRIGGS.	}
Plaintiff.	
vs.	
WILLIAM LAMB,	
Defendant.	

"We, the jury in this case, being duly impaneled and sworn, do find for the defendant.

"R. J. CULLY,
"Foreman."

The defendant in error thereupon moved for judgment upon the special finding for the sum of \$1,320.30, notwithstanding the general verdict, which motion was sustained, to which the defendant below excepted.

Various errors are assigned in this court. The testimony tends to show that at the date of the note in question, the defendant in error sold to one J. J. Dunbar thirty-six head of horses for the sum of nine hundred dollars. At the time of the sale it seems to have been represented to the defendant in error that Dunbar's note was as good as cash, and could be converted into cash at any of the banks in the city of Beatrice. Lamb at that time was engaged in the banking business in Beatrice.

Mr. Briggs presented the note at the bank of Mr. Lamb, at the request of a Mr. Emory, who had acted as agent of Dunbar in the transaction. Mr. Lamb seems to have refused to cash the note, when Briggs declared he must have guaranteed paper or he would not deliver the horses. Considerable conversation seems to have taken place between Briggs and Lamb in regard to guaranteeing the note. The testimony tends to show that Lamb refused to endorse the note. An agreement, however, was entered into between Lamb and Briggs, in consequence of which Lamb signed

Lamb v. Briggs.

the guaranty above set out. Mr. Briggs testifies that he inadvertently signed his name to the guaranty, and erased the same by running a pen across his name before the guaranty was signed by Lamb. Lamb, and some of his witnesses, however, testify that Briggs' name was not erased at the time that Lamb signed the guaranty and delivered it to Briggs. There is thus a direct conflict in the testimony on that point, which was directly put in issue by the pleadings, and the court erred in not requiring the jury to answer the interrogatories relating to that question.

2. The testimony tends to show that Lamb personally had no interest in the transaction relating to the horses, but that Dunbar seems to have been regarded as solvent, and Lamb appears to have made out the guaranty for the purpose of enabling Dunbar to complete the trade and obtain possession of the horses. It is claimed on behalf of Lamb that there was no consideration for this guaranty. It is apparent, however, but for the guaranty the horses would not have been delivered to Dunbar. This, therefore, is a sufficient consideration for the guaranty.

3. On the trial of the cause Lamb was asked if he had testified as a witness in an action by Briggs against Dunbar upon the note in question. He answered: "I think I did." He was then asked, "whether or not on that trial this question was not asked you?" "State to the jury what this conversation was," and "whether you answered this: Well, the first I remember of, was Mr. Waldo and Mr. Emory came into the bank and spoke something about my signing a note; if I recollect right, they came in first. I hung off about signing the note and made some inquiries. Afterwards Briggs and Waldo came into the bank, and I was there, and I think my son was in the bank at the same time. They made a statement they wanted the note secured or money paid on it. We could not pay the money on the note, and they wanted I should sign it and make

it good. I didn't want to do that. Finally, in conversation—after that—there was some conversation about it, and Briggs says in that conversation he let Dunbar have good property and he wanted a good note, else he could not have the horses.'” He answered he might have so testified. Afterwards Briggs offered the same testimony of the witness from the proceedings in the former trial. This was objected to for various reasons, which need not be stated, which objections were overruled and the testimony received. Such duplicate testimony was unnecessary and improper, and should have been excluded. But its admission was error without prejudice.

Section 295 of the code provides that, “When by the verdict either party is entitled to recover money of the adverse party, the jury, in their verdict, must assess the amount of recovery.” *Ames v. Sloat*, Wright, 577. *Black v. Wintersteen*, 6 Neb., 224. *Bowers v. Rice*, 19 Neb., 576. In the latter case the verdict was in the following form: “We, the jury, duly impaneled and sworn, do say that we find for the plaintiff.” It was held that such a verdict would not authorize a judgment for any sum whatever. It is claimed on behalf of Briggs that the special finding of the jury that the sum of \$1,320.30 was due from John J. Dunbar to Briggs, was a sufficient verdict to authorize a judgment against Lamb. But this does not follow unless the jury should also find that the guaranty of Lamb was of the whole amount due upon the note. There was no verdict, therefore, upon which to base a judgment. Exceptions are taken to a number of the instructions, but as there must be a new trial, in which, no doubt, the case will be tried upon the issues made in the pleadings, they need not be referred to.

There is testimony in the record tending to show that an execution was issued in favor of Briggs and against Dunbar on the judgment in question, and returned unsatisfied.

Richards v. State.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

WILLIAM H. RICHARDS, PLAINTIFF IN ERROR, V. THE
STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Bill of Exceptions:** FAILURE OF COURT REPORTER TO PREPARE WITHIN TIME. The law relating to the time in which bills of exception are to be prepared is to be liberally construed, and where a court reporter is unable to prepare the bill within eighty days from the adjournment of the court *sine die*, the fault not being that of the plaintiff in error, the bill should be signed and made a part of the record.
2. —: AFFIDAVITS used in the hearing of a matter in the trial court must be embodied in a bill of exceptions to be available as evidence in the supreme court.
3. **Criminal Law: FINDING OF GRAND JURY.** Where a party is bound over to await the action of a grand jury, and the grand jury investigates the charge and makes report to the court, "no cause of action," and the accused is thereupon discharged, the prosecuting attorney cannot treat such finding as void and file an information against the accused for the same offense, upon the same evidence—the jury being the judges of the credibility of the witnesses.
4. —: INFORMATION. Under chapter 54 of the criminal code, the prosecuting attorney, in preparing and filing an information against a party accused of crime, takes the place of a grand jury, and as a grand jury cannot delegate its authority to find an indictment, neither can the prosecuting attorney delegate his authority to file an information.
5. —: —. An information, under chapter 54 of the criminal code, must be sworn to before a magistrate—one authorized to administer the oath, and not before a notary public.

22	145
26	759
22	145
31	120
31	252
32	229
32	296
22	145
36	162
36	810
22	145
43	865
22	145
49	853
53	253
22	145
61	189

6. **Prosecuting Attorney : DEPUTY.** Where the appointment of a deputy prosecuting attorney is challenged, and there is no copy of his appointment or evidence that he took the oath or gave the bond as required by law, the proof is insufficient to show his appointment as deputy.

ERROR to the district court for Gage county. Tried below before BROADY, J.

Burke & Prout and N. T. Gadd, for plaintiff in error.

William Leese, Attorney General, for the State.

MAXWELL, CH. J.

The plaintiff was convicted of embezzlement in the district court of Gage county, and sentenced to imprisonment in the penitentiary. He now prosecutes a petition in error.

The attorney general moves to quash the bill of exceptions, for the reason that it was not signed within eighty days from the time the court adjourned *sine die*. It appears from the record that the time in which to prepare the bill was extended to eighty days, and the stenographer certifies that he was unable to prepare the bill within the time limited. This being the case, the plaintiff was not at fault. So far as appears, he has done all that he could to procure the bill within the time stated. In the absence of a showing to the contrary, all presumptions of diligence are in favor of the plaintiff in error. The law relating to the preparation of bills of exception should be liberally construed as being in furtherance of justice. The motion must therefore be overruled.

2. There is also a motion to suppress certain affidavits for the reason that they are not embodied in a bill of exceptions. The invariable holding of this court has been that where affidavits were used on the hearing of a matter in the court below, they must be embodied in a bill of exceptions to be available as evidence in the supreme

court; in other words, as evidence that they were used on the hearing in the court below. The motion to suppress must therefore be sustained.

3. It appears from the record that prior to the 20th day of September, 1886, the plaintiff had been bound over to await the action of the grand jury of Gage county on a charge of embezzlement; that on that day the said grand jury made the following report to the court:

"STATE OF NEBRASKA, }
 vs. }
W. H. RICHARDS. }

"Witnesses examined by the grand jury and no cause of action found.

"L. C. BROWN,
"Foreman."

The court thereupon made the following order:

"STATE OF NEBRASKA, }
 vs. }
W. H. RICHARDS. }

"Sept. 26. The grand jury having ignored the charge, the defendant is discharged."

The plaintiff then departed to his home in another state. On the 28th of the same month, Alfred Hazlett, who also signs the information as deputy district attorney, filed an information in said court, charging the plaintiff with the same offense, which the grand jury had investigated and found no bill. This information was sworn to before a notary public. The law has not made it the duty of a district attorney to file an information in a case in which a grand jury had refused to find a bill. The grand jurors, upon oath, find or refuse to find an indictment, and at least twelve of them must concur in making the charge. In other words, an indictment is a positive charge upon oath of at least twelve of the grand jurors, that the accused is guilty of the offense charged, while a refusal to find a bill is equivalent to a finding under oath of said jurors

that the evidence is insufficient to warrant the charge. The defendant is therefore entitled to his discharge, and no prosecuting officer has the right to treat such finding as void.

In cases where additional evidence is submitted to the same or a subsequent grand jury, it is probable that a different result may be reached. 4 Black. Com., 305. The author quoted says (Id., 305) that, "where the jury think the charge groundless they indorse the indictment prepared by the prosecuting officer 'not a true bill,' or, which is a better way, 'not found,' and then the party is discharged without further answer. But a fresh bill may afterwards be prepared to a subsequent grand jury."

The act of charging a party with the commission of a crime which may blast his reputation and cover his name with ignominy is certainly a serious one, which ought not to be done without sufficient cause. From the days of Magna Charta, the common law, in theory at least, has protected all persons from needless accusations. The grand jury itself was devised for the purpose of privately investigating a charge against a party, and finding a reasonable probability of the truth of the charge before making it public in the form of an accusation or indictment. In all such investigations the jurors are, as in other cases, the judges of the credibility of the witnesses, and they may believe or disbelieve any or all of the testimony introduced before them. If they refuse to believe certain testimony and therefore refuse to find a bill, it is not in the power of a prosecuting officer to say that he believes such testimony and thereupon proceed to file an information. We do not hold, however, that where new evidence is offered which was not before the grand jury, that such information cannot be filed.

4. Section 579 of the criminal code provides that, "all informations shall be filed during term in the court having jurisdiction of the offense specified therein, by the *prose-*

outing attorney of the proper county as informant ; he shall subscribe his name thereto and indorse thereon the names of the witnesses known to him at the time of filing the same ; and at such time before the trial of any case as the court may, by rule or otherwise, prescribe, he shall endorse thereon the names of such other witnesses as shall then be known to him."

Sec. 583 makes it his duty to inquire into and make full examination of all the facts and circumstances connected with any case by preliminary examination, while section 585 declares that, "no information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor, as provided by law, before a justice of the peace or other examining magistrate or officer, unless such person shall waive his rights to such examination," an exception being made as to fugitives from justice.

The prosecuting attorney of a county is a *quasi* judicial officer. The law has intrusted him with power upon what *he* deems sufficient cause to institute prosecutions. He takes the place of a grand jury, and as the law imposed upon the grand jury the duty of determining whether or not sufficient had been shown to justify an indictment against the accused, and gave them no authority to depute other persons to determine that fact and make a presentment, so the law imposes this duty on the prosecuting attorney, and gives him no authority to confer this power on another person. Like a judge, his power to determine what cases shall be prosecuted by filing an information cannot be delegated, but must be performed by himself. At common law, if an indictment was found by a grand jury, one of whose members did not possess the necessary qualifications, it vitiated the indictment. 1 Bish. Cr. Proc., § 856a. *Kitrol v. State*, 9 Fla., 9. *U. S. v. Hammond*, 2 Woods, 197. *State v. Clough*, 49 Me., 573. This is upon the principle that the indictment shall be

preferred only by persons duly authorized. How much more important that an information, which takes the place of an indictment, be prepared by one whom the law has clothed with power to prefer the charge, and unless it is filed by an officer having such authority, it will be a nullity.

5. The information was sworn to on information and belief before a notary public. In order to authorize the filing of an information, except in case of fugitives from justice, there must have been a previous examination, based on an accusation under oath, charging the party with the commission of the crime. An information sworn to by the prosecuting attorney, upon information and belief is sufficient, but the oath must be taken before a judicial officer,—one authorized to administer the oath. At common law, such oath was taken before a magistrate. 1 Chitty Cr. Law, 26, and the common law on that point prevails in this state. A notary public is an officer of the civil and commercial law, and is unknown to the criminal law, and the oath was unauthorized. It may be, however, that the plaintiff has waived that objection by pleading to the information.

6. The appointment of the deputy prosecuting attorney is challenged in the proceedings, but there is no copy of an appointment or evidence that he took the oath or gave bond, as required by law. If a deputy could be appointed for a particular case, and without entering into the obligations imposed by law, could institute and carry on criminal prosecutions, there is reason to believe that such prosecutions would be used as a means to gratify personal malice, to collect debts, or as a means of persecution. But there is no such authority given to a deputy. The judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

THE other judges concur.

HOSEA R. DILLON ET AL., APPELLEES, v. LYDIA MERRIAM, EXECUTRIX, ETC., APPELLANT.

1. **Taxes:** PETITION TO CANCEL TAX DEED. Where a plaintiff files a petition to cancel a tax deed upon his land and remove a cloud from his title thereto, as a condition of granting relief, he will be required to do equity by paying the taxes justly chargeable against said land.
2. ———: ———: An allegation, "That all proceedings of said treasurer and the defendant Merriam were unlawful and void, and irregular in this: that said land was not assessed for taxes in the years 1863 and 1865, as required by law, and no taxes for the years 1863 and 1865 were levied thereon, as required by law, and said land was not advertised for sale for the taxes of 1863 and 1865, as required by law," without stating in what respect there was a failure to comply with the law, is not sufficient to justify a court in holding that the taxes so assessed were invalid.
3. ———: **SALE: INTEREST TO TAX PURCHASER.** Where for want of authority of the treasurer to sell land for taxes no title passes to the purchaser, he is merely subrogated to the rights of the county, and to the same rate of interest that the county would be entitled to recover.

APPEAL from Otoe county, HAYWARD, J., presiding.

C. W. Seymour, for appellant.

No appearance for appellee.

MAXWELL, CH. J.

This action was brought in the district court of Otoe county by the plaintiffs against Selden N. Merriam to cancel and annul certain tax liens and tax deeds upon the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ and the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, all of Sec. 14, Tp. 9 north, of range 12 E., in Otoe county.

On the trial of the cause in the court below a decree was rendered in favor of the plaintiffs, but requiring them to

22	151
26	572
26	577
22	151
28	741
22	151
42	463
22	151
51	468
54	735
22	151
57	685
22	151
60	256
22	151
61	877

pay the sum of one hundred four and $\frac{78}{100}$ dollars taxes and interest on said land. The defendant appeals.

Two questions are presented by the record which will be noticed in their order.

The testimony tends to show that the plaintiffs have been in possession of said land since about the year 1859; that during the years 1863 and 1865 certain taxes were assessed against said land, and that the land was sold for the same to one D. J. McCann. McCann assigned his tax certificate to one Selden N. Merriam, who in 1875 procured a tax deed. Merriam has died since the commencement of this action, and it was revived in the name of the defendant. It also appears that there was a sufficient amount of personal property belonging to the plaintiffs in Otoe county at the time said taxes became due to have satisfied the same; but the treasurer, instead of collecting the tax out of the personal property as required by the statute as it then existed, sold the land therefor. This he had no authority to do, and the sale and deed were invalid. The principal object of this action is to cancel the deed above described.

The court below failed to allow the taxes assessed against said land during the year 1863, apparently upon the ground of informality in the assessment. The allegations in the petition upon that point are: "That all the proceedings of said treasurer and the defendant Merriam were unlawful and void and irregular in this, that said land was not assessed for taxes in the years 1863 and 1865 as required by law, and no taxes for the years 1863 and 1865 were levied thereon as required by law, and said land was not advertised for sale for the taxes of 1863 and 1865 as required by law." It will be seen that there was no allegation that the land was not subject to taxation, but simply a claim that the taxes were not assessed as required by law. In what respect the assessment failed to comply with the law is not stated. When a party comes into a court of

equity asking relief, as a condition the court will require him to do equity before it will be granted. This principle lies at the foundation of equity jurisprudence. *Linden v. Hepburn*, 3 Sand., 671. This rule is frequently applied where a party brings an action to cancel an usurious mortgage upon land. In every such case where the borrower brings the action the court will require him to pay the sum actually borrowed, with lawful interest, before relief will be granted. *Post v. Bank of Utica*, 7 Hill, 391. *Rogers v. Rathbun*, 1 J. Ch., 367. *Tupper v. Powell*, Id., 439. *Fanning v. Dunham*, 5 Id., 142. *Livingstone v. Harris*, 3 Paige, 533. *S. C.*, 11 Wend., 329. *Vilas v. Jones*, 1 Comst., 278. *Legoux v. Wante*, 3 Har. & John., 184. This rule will be applied in the cancellation of tax deeds, and where the tax was a proper charge against the land, the landowner, as a condition of canceling the tax deed, will be required to pay the tax with lawful interest thereon. The court therefore erred in excluding the tax of 1863.

2. The defendant contends that she is entitled to forty per cent per annum interest on the amount of taxes paid until the time to redeem expired.

In *Pettit v. Black*, 8 Neb., 52, it was held that where the sale of the land was invalid the tax purchaser would be subrogated to the rights of the county. In effect, there was no valid sale. The purchaser therefore simply acquires the lien possessed by the county, which would entitle him to interest at the rate of one per cent per month. *Lynam v. Anderson*, 9 Neb., 367. *Jones v. Duras*, 14 Neb., 40. There having been no valid sale of the land the tax purchaser is subrogated merely to the rights of the county, and is not entitled to the rate of interest claimed.

The decree of the court below will be modified to allow the defendant the taxes of 1863 with one per cent per month interest thereon, and as thus modified the decree is affirmed.

DECREE ACCORDINGLY.

THE other judges concur.

E. F. DAVIS, PLAINTIFF IN ERROR, V. GEORGE R. SCOTT, DEFENDANT IN ERROR.

1. **Fraud: INTENT A QUESTION OF FACT.** The question of fraudulent intent is generally determined from the existence of other facts which tend to establish it. The question of the existence of facts showing a fraudulent intent are alone for the jury to determine and not for the court. *Hedman v. Anderson*, 6 Neb., 392.
2. **CHATTEL MORTGAGE.** A chattel mortgage of a stock of goods containing a clause by which the mortgagor is given possession, with power of sale in the usual course of trade, the proceeds to go in satisfaction of the mortgage debt, although by our statute made presumptively fraudulent, is not conclusively so, and may, by satisfactory evidence, be shown to have been made in good faith. *Turner v. Killian*, 12 Id., 590.
3. **Assignment: PREFERRED CREDITORS.** A debtor has the right to prefer his creditors and to pay or secure those preferred. The execution of chattel mortgages to preferred creditors, if made in good faith to secure *bona fide* debts, even if made to a considerable number of such creditors at or about the same time—no trust being created—will not constitute an assignment for the benefit of creditors if not so intended.

ERROR to the district court for Gage county. Tried below before BROADY, J.

J. E. Cobbey, for plaintiff in error.

Pemberton & Bush and *Haslett & Bates*, for defendant in error.

REESE, J.

This was an action in replevin instituted in the district court by defendant in error for the purpose of recovering the possession of a stock of goods formerly owned by R. N. Townsend & Co. A part of the alleged creditors of the firm obtained chattel mortgages on the goods on the

second day of August, 1886. These mortgages were filed in the office of the county clerk and soon thereafter the sheriff, who is plaintiff in error here, seized the mortgaged goods, as the property of R. N. Townsend & Co., for the satisfaction of certain writs of attachment held by him against the firm. The notes and mortgages were transferred to defendant in error and he instituted the suit for the possession of the property in dispute. The petition is in the usual form for declaring upon a special ownership. The answer consists of a general denial, substantially, and also the averments that the mortgages were given for the express purpose of cheating and defrauding the attaching creditors, denies that they were given for value, and pleads the writs of attachment by virtue of which the levies were made. A jury trial was had which resulted in a verdict in favor of defendant in error and judgment thereon.

Complaint is made that the court erred in giving the first instruction to the jury. It is as follows:

"The burden of proof is on the plaintiff to prove that the debts secured by the several chattel mortgages under which he claims were genuine and *bona fide*. This he has done. Yet there is another question in the case that the court submits to you and that is, whether the clause in the said mortgages providing that, 'the mortgagor has leave to continue to sell said goods in the usual course of trade for the sole purpose of raising money to pay this indebtedness, and the mortgagor agrees to account to the mortgagee for the proceeds of all such sales,' was made in good faith in each of said mortgages, and not for the purpose of defrauding creditors. If you find that said clause was made in good faith, find for plaintiff and assess his damages for the unlawful detention, which will be merely nominal, and return your verdict accordingly. If you find that said clause was in bad faith, or fail to find that it was in good faith, find for the defendant and assess his damages for the unlawful detention."

The objection to this instruction is to the first clause thereof, which tells the jury that the plaintiff had proven that the debts secured by the several chattel mortgages were genuine and *bona fide*. As we have seen, this question was one of the issues presented for trial by the issues in the case.

It is true that no witness testified upon the trial that the notes and mortgages were not "given for value," and were not "given for the purpose of cheating and defrauding" the creditors of the mortgagors, yet it is the opinion of the majority of the court that the whole question of the *bona fides* of the mortgages should have been submitted to the jury.

In *Hedman v. Anderson*, 6 Neb., 392, it is said by the present chief justice, in writing the opinion of the court, that, "The question of fraudulent intent is generally determined by the existence of other facts which tend to show it. In but few instances can it be shown by direct testimony, and must therefore be established by circumstantial evidence; but the question as to the existence of facts showing a fraudulent intent, are alone for the jury to determine, and not for the court. If, however, certain facts are *conceded* to exist, the question of their sufficiency to indicate a fraudulent intent becomes a question of law, which the court must determine. But the question of the credibility of the witnesses rests entirely with the jury."

While the writer is unable to detect anything in the evidence which tends to impeach the *bona fides* of the debts secured by the chattel mortgages, yet it is quite probable that, under the issues presented, the whole question of fact should have been submitted to the jury for their determination.

It is contended by plaintiff in error that the court erred in admitting in evidence the notes and mortgages upon which the claim of defendant in error was based, for the reason that the mortgages contained a condition that the

Davis v. Scott.

mortgagor should remain in possession of the mortgaged property, with power of sale in the usual course of trade, the proceeds to go in satisfaction of the mortgage debt, and they were therefore void. We do not think the court erred in this respect. While the legal presumptions are against the *bona fides* of such mortgages, they are not conclusively so, and it may be shown by competent evidence that they were in fact made in good faith, and without fraudulent intent. *Turner, Frazier & Co. v. Killian*, 12 Neb., 580.

It is next urged that the trial court erred in refusing to give an instruction asked by plaintiff in error, to the effect that the mortgages introduced by Townsend & Co. to various creditors, and upon which defendant in error relied as the basis of his alleged right to the possession of the property in dispute, were in law an assignment for the benefit of creditors, and therefore void. There was no error in refusing to give this instruction. The mortgages were executed directly to the several creditors, individually, for the purpose of securing their alleged demands. No trust was thereby created. The debtor had the right to prefer creditors, and pay or secure them if he so desired. If done in good faith, to secure *bona fide* debts, they were simply mortgages. *Gage v. Parry*, 69 Iowa, 605.

For the reason that the trial court erred in giving the instruction above quoted, the judgment is reversed and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

THE STATE OF NEBRASKA, EX REL. THE OMAHA AND
 SOUTH OMAHA STREET RAILWAY CO., PLAINTIFF,
 v. WM. F. BECHEL, MICHAEL LEE, THOMAS J.
 LOWRY, JACOB M. COMISMAN, FRANK J. KASPAR,
 LEAVITT BURNHAM, ALBERT M. KITCHEN, PAT-
 RICK FORD, CHARLES CHENEY, ISAAC S. HASCALL,
 WM. I. KIERSTAD, ADAM SNYDER, JEFFERSON W.
 BEDFORD, CHAS. L. VANCAMP, WM. H. ALEXAN-
 DER, JOHN M. BOYD, FREELAND W. MANVILLE,
 FRANK E. BAILEY, AND JOSEPH R. SOUTHARD,
 DEFENDANTS.

Street Railroad: CONSENT OF ELECTORS: VOTE REQUIRED.

Where the question of giving consent to a street railway com-
 pany to construct and maintain a street railroad upon the
 streets of the city of O. was submitted to the electors of said
 city on the day of the general city election, and the ballot upon
 that proposition was taken at the same place, by the same elec-
 tion officers, and but one poll list made, and the votes were can-
 vassed and returned, in some of the precincts and wards, upon
 the same tally sheet and return; but in all of the wards a sep-
 arate ballot box was prepared into which the vote upon the
 proposition was deposited, but without other formality to sepa-
 rate the vote from the vote of the general election, it was held
 that in order to give the required consent the affirmative of the
 proposition must receive a majority of all of the votes cast a
 such election.

ORIGINAL application for mandamus.

Congdon, Clarkson & Hunt, for relator, cited: *People v.*
Warfield, 20 Ill., 163. *People v. Garner*, 47 Id., 246.
Angell & Ames Corp., Secs. 499-500. *State v. Mayor*, 37
 Mo., 272. *State v. Binder*, 38 Id., 450. *St. Joseph v.*
Rogers, 16 Wall., 644. *County of Johnston*, 5 Otto, 369.
Sanford v. Prentice, 28 Wis., 358.

J. L. Webster, for respondent, cited: *Harshman v. Bates*
County, 92 U. S., 569. *State v. Winklemien*, 35 Mo., 103.

REESE, J.

This is an application for a peremptory writ of mandamus to the council and city clerk of the city of Omaha for the purpose of compelling them to certify the result of an election held in said city on the 3d day of May, 1887, at which it is alleged that a majority of the electors of said city had given their consent to the construction and operation of a street railroad, by plaintiff, upon the streets of the city. The cause is submitted upon the petition and motion for the writ in connection with a stipulation of such material facts as do not appear in the petition. These facts may be briefly stated as follows:

Plaintiff is a corporation, organized under and by virtue of the laws of this state, for the purpose of constructing and operating a street railroad on and through certain streets of the city of Omaha. The defendants are the councilmen and city clerk of the city of Omaha, which is a municipal corporation organized under the laws of the state. That at the time of the passage and approval of the ordinance hereinafter referred to and the holding of an election thereunder, it was a city of the first class, but that it is now known as a city of the metropolitan class—so designated by law—and that defendants, councilmen, are the successors in office of the councilmen while the city was denominated a city of the first class. That prior to the 3d day of May, 1887, plaintiff made application to the city council for the passage of an ordinance providing for the submission to the electors of the city the question of consent to the construction and operation of a street railroad by said plaintiff through certain streets therein, and that thereupon the city council passed an ordinance providing for such submission and requesting the mayor to call an election that the question might be voted upon. The mayor gave notice, as provided by law, that an elec-

tion would be held on the 3d day of May, 1887, that being the day of the general city election.

The registry of voters for the city election showed that there were 10,045 names registered. There were 8,146 votes cast at the general election. The number of votes cast upon the question of consent to plaintiff to construct and operate its road was 1,650, of which 1,470 were in the affirmative and 180 in the negative. There were but the usual number of judges and clerks of election. No separate poll list of those who voted upon the question submitted was kept. A separate ballot box was prepared, and when an elector came to the polls to vote, if his name was upon the list of registered voters, or if he proved himself to be an elector, he was permitted to vote, his name was checked off the registration list and place on the duplicate poll books. This was done whether he voted a ticket for the general election, and for or against the proposition submitted, or simply on the proposition, but one poll list being made. The ballot box for the general city election alone determined the number of votes cast at that election, and the ballot box for the proposition alone determined the number of votes cast on the proposition. At the close of the polls a tally sheet was made, and the votes canvassed in the usual way. In some precincts and wards, separate tally sheets were prepared and used in canvassing the votes upon the proposition submitted, while in others the tally sheet of the general election was used. The result being certified to the city council, they refused to cause the city clerk to certify to plaintiff the necessary consent, but declared that the consent of the electors of the city had not been given. Plaintiff, by its chief officer, demanded the certificate of defendants, but compliance was refused.

It is contended on the part of plaintiff that the proposition submitted received the consent of a majority of the electors, for the reason that a majority of the votes cast upon this particular question were in the affirmative, and

that the vote deposited in the ballot box prepared for the reception of ballots cast upon the proposition should, for the purpose of the canvass, be taken as the full vote of the city, while it is contended by defendant that consent in such case cannot be considered as given unless it appears that a majority of all the electors in the city, as shown by the registry, is in favor of such consent. It is also contended that if such is not the law, yet it appears that the affirmative of the proposition did not receive a majority of the votes cast at the election, and that therefore the writ should not be awarded. The former contention of defendant is founded, in part, upon the language of sections one and two of the article of the constitution of the state entitled "Miscellaneous corporations." These sections are as follows:

"Section 1. No corporation shall be created by special law, nor its charter extended, changed, or amended, except those for charitable, educational, penal, or reformatory purposes, which are to be and remain under the patronage and control of the state, but the legislature shall provide by general laws for the organization of all corporations hereafter to be created. All general laws passed pursuant to this section may be altered from time to time, or repealed.

"Section 2. No such general law shall be passed by the legislature granting the right to construct and operate a street railroad within any city, town, or incorporated village, without first requiring the consent of a majority of the electors thereof."

It is claimed that this provision requires the consent, affirmatively given, of a majority of all the electors of the city before the franchise can be said to be given, and that it will not do to say that a majority of the votes polled at an election held for the purpose of voting on a question submitted, if cast in the affirmative, will give the required consent, unless such majority constitutes a majority of all

the electors in the city. While, as we view this case, a decision upon this question is not essential to a determination, yet it is deemed proper to say that upon a full examination of the question, we are all of the opinion that this section does not go to the length contended for. It is believed that where an election is held upon such submission and a majority of the votes cast are in favor of the proposition, this should be taken as giving the required consent. For a review of the authorities upon this question, in addition to those cited by counsel, we cite the case of *The State, ex rel. Stevenson, v. Babcock*, 17 Neb., 188.

But our attention must be given to the second contention of defendant, *i. e.*, that the affirmative of the proposition did not receive a majority of all the votes cast at the election, and that it was, therefore, defeated.

Section five of article eight of chapter seventy-two of the Compiled Statutes provides in substance that elections held for the purpose of voting on propositions of the kind now under consideration, shall be held at the time designated in the notice, and as other elections are held, the returns canvassed, and the result declared, "and if a majority of the votes cast at *such election* shall be in favor of the constructing and operating of such proposed street railroad" the council shall cause the clerk to make the certificate, etc. It is impossible for us, by any system of logical reasoning, to say that the election held in the city of Omaha on the 3d day of May, 1887, was other than one election. There were but the usual number of judges and clerks, but one poll list, and in some precincts but one return. If we say there were two elections, to-wit: the general city election, and the election upon the proposition submitted, to which of these can we say the poll list, or list of voters actually voting, belonged? Most certainly to the general election. If that is true, to what record can we apply for a list of those who voted at the other election, *i. e.*, the one in which votes were cast on the prop-

Methodist Protestant Church v. Johnson.

osition? How could that election be contested upon the ground that illegal votes were cast by those who were not electors? Obviously it could not be successfully done. How can it be said that the fact that another ballot box was prepared, into which the ballots were deposited to be counted as cast upon the proposition in question, would produce a different legal result than if the proposition had been written or printed on the tickets for the general election, and only 1,650 of the voters had voted upon the question. We confess our inability to divide or separate the election of the day named, and must hold that it constituted but one election. That being the case, "a majority of the votes cast at such election" were not "in favor of the constructing and operating such proposed street railroad," as required by the law of the state, and the consent of a majority of the electors was not given.

The writ, therefore, must be denied.

JUDGMENT ACCORDINGLY.

THE other judges concur.

THE BOARD OF CHURCH EXTENSION OF NEBRASKA
CONFERENCE OF THE METHODIST PROTESTANT
CHURCH IN THE STATE OF NEBRASKA, PLAINTIFF
IN ERROR, v. J. D. JOHNSON, DEFENDANT IN
ERROR.

no error in the judgment of the district court being shown, the judgment is affirmed.

ERROR to the district court for Lancaster county. Tried below before MITCHELL, J.

Church Howe, J. C. Watson, and R. D. Stearns, for plaintiff in error.

O. P. Mason and T. M. Marquett, for defendant in error.

REESE J.

This was an action in ejectment instituted by plaintiff against defendant. Final judgment was rendered in favor of defendant, and plaintiff prosecutes error to this court.

There are four assignments of error in the petition in error. They are as follows :

1. The finding and judgment of the court below are not sustained by sufficient evidence.
2. The finding and judgment are contrary to law.
3. The court erred in admitting incompetent evidence.
4. Errors of law committed by the court during the progress of the trial.

The only question presented to this court by plaintiff in error is the one contained in the first of the above assignments, and to that alone will we direct our attention.

The real estate in question was originally conveyed by the United States to Julian Metcalf, by patent dated May 10th, 1864.

On the 14th day of May, 1864, Metcalf deeded to John M. Young, and on the 19th day of August of the same year John M. Young conveyed it to Lancaster Seminary. The minutes of this organization show that on the 6th day of January, 1868, the last meeting of the board of trustees of the seminary was held, the following being adopted by said board :

" Resolved, That whereas the board of trustees have conveyed to the state of Nebraska all their interest in the town of Lancaster, thus parting with all funds for building a seminary ; therefore we do not deem it necessary to

collect from the school district any more than sufficient to pay the just indebtedness of the seminary. * * Received from the directors of the school district an order on the school district treasurer for twenty-five dollars and $\frac{26}{100}$.

"The secretary is ordered to collect the above warrant, and with the assets on hand pay off all indebtedness.

"Moved, that when this meeting adjourn, it be a final adjournment, and the organization be dissolved."

Although there is nothing in the brief of plaintiff to so indicate, yet we deem it probable that its claim of ownership is founded upon the fact that upon the dissolution of the organization known as "Lancaster Seminary," the title to its property vested at once in plaintiff, or, perhaps, in the conference of the Methodist Protestant church of Nebraska, and through it, in plaintiff.

Defendant claims title through the following conveyances: On the first day of August, 1867, Lancaster Seminary, by its warranty deed, conveyed the property to the state of Nebraska, and on the third day of the same month and year, John M. Young made a quit-claim deed thereof to the state. On the 7th day of December, 1867, the state conveyed to Jason G. Miller, and he, on the 25th of June, 1881, conveyed to defendant. These conveyances, it will be observed, complete the chain of title from the United States to defendant. There is no suggestion by plaintiff in error in its brief, or otherwise, that any of the conveyances through which defendant claims were imperfectly or informally executed; nor that there was any want of authority or power to convey.

As we have seen, the final dissolution of Lancaster Seminary occurred on the 6th day of January, 1868. Prior to that time—in August, 1867—it had conveyed all its title to the property to the state. At the time of its dissolution it claimed no title, and, so far as the record shows, it had none.

 Welch v. Calhoun.

We see no reason why the judgment of the district court is not correct. It is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JOSEPH F. WELCH, PLAINTIFF IN ERROR, v. SIMEON
H. CALHOUN, DEFENDANT IN ERROR.

Judgment: FINAL ORDER. An order of a district court sustaining a motion to strike an amended petition from the files is not a final order from which error may be taken to the supreme court, in the absence of a judgment.

ERROR to the district court for Otoe county. Tried below before POUND J.

Frank T. Ransom, J. C. Watson, and George W. Covell,
for plaintiff in error.

Simeon H. Calhoun, pro se.

REESE, J.

The submission of this cause is upon a motion to dismiss the petition in error. The ground assigned for the motion is, that there was no final judgment or order rendered in the district court upon which a proceeding in error could be predicated. The order complained of was made upon a motion to strike the amended petition of plaintiff from the files. It is as follows :

“And now, on the 1st day of October, 1886, this cause comes on for further hearing and ruling of the court on the motion of the defendant, Simeon H. Calhoun, to

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22	166
54	69
22	166
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strike the amended petition from the file, and this said motion, having been heretofore, at the March term, argued and submitted to the court and by the court taken under advisement, and being now well advised in the premises, doth sustain the same. To which ruling of the court in sustaining said motion the plaintiff excepts, and forty days are given to reduce his said exceptions to writing."

Section 582 of the civil code provides that, "A judgment rendered or final order made by the district court may be reversed, vacated, or modified by the supreme court, for errors appearing on the record."

By section 581 a final order is defined to be "an order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment."

It is apparent that under this definition the order of the district court sustaining the motion to strike the amended petition from the files was not an order, which, in effect, determined the action and prevented a judgment. So far as is shown by the record—this order being the last one entered—no final order has been made and the cause is yet upon the docket of the district court for determination.

Plaintiff in error has cited two cases from the supreme court of Michigan (*Webster v. Hitchcock*, 11 Mich., 56; *McCann v. Westcott*, 47 Id., 177), in which it is held that such an order as the one made in the case at bar is final, and can be reviewed on error. But we have failed to find any statutory enactment in that state by which a final order is defined, as in this. And did one exist, we should feel bound by the decision of this court, by which the law of the state is fully settled, and, we think, correctly. See *Daniels v. Tibbitts*, 16 Neb., 666. *Artman v. West Point Manufacturing Co.*, Id., 572. *Nichols v. Hail*, 5 Id., 194. *Aspinwall v. Aspinwall*, 18 Id., 463.

The motion to dismiss for want of final judgment is sustained.

JUDGMENT ACCORDINGLY.

THE other judges concur.

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C. J. COOPER & Co., PLAINTIFFS IN ERROR, V. TRUMAN
HALL, DEFENDANT IN ERROR.

1. **Sale: WARRANTY.** Where a bill of hardware was ordered of a traveling salesman, without samples, upon a warranty as to quality, for the purpose of combining the goods so ordered with other material in the manufacture of harness and upon using a part of the hardware in the manufacture of harness, it proved, upon trial, to be defective and worthless, and upon comparison it was found that the remainder of the hardware was of the same general character and apparent quality, and that the further use of the hardware in the manufacture of harness would necessarily result in a loss to the purchaser and manufacturer, he would be justified in refusing to further use the hardware, and holding it for the use of the vendor. In such case, where the purchaser acted in good faith, there would be no liability for the purchase price.
2. **Trial: VERDICT: PRESUMPTION.** Where a cause is submitted to a jury upon conflicting testimony, there being no objection to the instructions of the court, and the verdict is consistent with the line of testimony presented by one of the parties to the suit, an appellate court will presume that the jury adopted the line of testimony with which their verdict corresponds.

ERROR to the district court for Cass county. Tried below before POUND, J.

H. D. Travis, for plaintiff in error, on question of damages, cited: *Milbourn v. Belloni*, 34 Barb., 607. *Jones v. Nathrop*, 1 Pac. Rep., 435. *Griffin v. Colver*, 16 N. Y., 489. *Milwaukee R. R. v. Kellogg*, 94 U. S., 469. *Bird-*

sall v. Carter, 11 Neb., 143. Field on Damages, sec. 281. On retaxation of costs, cited: Maxwell's Justice, 72. *Bliss v. Long*, 5 Ohio, 276. *Russell v. Giles*, 31 Ohio State, 293. *Stokes v. Kare*, 11 Wis., 389.

S. F. Rockwell, for defendant in error, cited: *Faulkner v. Klamp*, 16 Neb., 179. *Birdsall v. Carter*, 11 Id., 143.

REESE, J.

This action was originally instituted before a justice of the peace in Cass county. After trial and judgment the cause was removed to the district court by appeal, where a jury trial resulted in a verdict for defendant, and upon a judgment being rendered thereon, the plaintiff brings error to this court.

The plaintiff's action was founded upon an account for merchandise, consisting of saddlery and harness hardware, amounting to the sum of \$39.22. Defendant, by his answer, admitted the purchase of the hardware, by order, through a salesman of plaintiff, but alleges that it was warranted to be of good quality, and that if not so found upon trial, it need not be paid for. That upon such trial it was found to be worthless, and could not be used in the manufacture of harness, and that many of the harness in which it was used were returned broken, by the failure of the hardware to answer the purpose of its manufacture, and other material had to be used instead. It is alleged that the hardware was worthless and of no value. There are other allegations in the answer which need not be noticed.

The verdict of the jury was in favor of the defendant, but allowing him no affirmative damages.

The testimony was conflicting. On the part of defendant, upon whom was the burden of proof, it was to the effect that he gave the order to the traveling salesman,

without samples and upon the warranty alleged. That upon the receipt of the hardware he began its use at once in the manufacture of harness, but that in a few days the harness began to be returned for repairs, owing to the breaking of the hardware used. That he ascertained by examination that the breakage was caused by defective material and manufacture, and substituted other hardware of a different manufacture, which gave satisfaction. That upon examination and comparison he discovered that the unused portion of the hardware was of the same general appearance and quality of that which had proved worthless, and he had declined to use it further and had returned it to the express office. If this testimony was true, the verdict was right. As to its truth, the jury were the judge, and their verdict could not be molested as being against the evidence.

It is insisted that plaintiffs should have recovered a judgment for some amount, as it is not claimed that all the hardware was shown to be defective. While this may, in a sense, be true, yet we could not reverse the judgment on this ground, for, if plaintiff is to be believed, his testimony did tend to prove the worthless character of substantially all by a comparison of that part which was proven bad with that which was not tested. But we cannot agree with plaintiff's counsel that the rule contended for should govern. It was not the purpose of the manufacturer of the hardware that it should be used independently, but, upon the contrary, its value consisted in its being combined with other material in the manufacture of harness, etc. If this hardware, upon trial, proved to be worthless—and of that it was the province of the jury to decide—it would have been folly for defendant to have continued its use in such manufacture, with the consciousness that it must result only in loss. The bill consisted of such hardware as usually enters into the manufacture of harness. If the material was so defective as to render the harness, when

made, of less value than if composed of good material—so far as the hardware was concerned—and of this fact the jury were the judges—defendant would be justified in refusing to use it and hold it subject to plaintiff's order.

It is contended that the jury failed to follow the instructions of the trial court as to the measure of damages. This contention is based upon the assumption that damages were allowed for loss of custom growing out of defective harness sold by defendant, as a result of the bad material purchased by him, of the plaintiff. There is nothing shown in the record by which it appears that any such damages were allowed by the jury, and we cannot presume that such was the case. The instructions of the court gave no directions of that kind, and no affirmative damages are shown by the verdict.

After judgment had been rendered plaintiff filed a motion by which he sought an order requiring the clerk to tax the costs made by each party separately, and that only the costs of the defendant be included in the judgment recovered by defendant.

As to the second clause of this motion, it must be sufficient to say that the judgment rendered was all that could have been done, had the motion been sustained. It is, that defendant "recover of and from the said plaintiff his costs in and about this suit in that behalf expended," etc. As to the first clause of the motion, asking that the costs be taxed separately, the motion should have been sustained.

Section 30 of chapter 28 of the Compiled Statutes of 1885 is as follows: "In all actions, motions, and proceedings, in the supreme, district, or justices' courts, the costs of the parties shall be taxed and entered on the record separately." This provision of the statutes should have been complied with. This error, however, will not require the reversal of the judgment in favor of defendant, upon the merits of the case, but only so far as to correct the error found in the record.

The order overruling the motion for a new trial and ren-

dering judgment in favor of defendant is affirmed, and the order overruling plaintiff's motion for a separate statement of the costs is reversed and the motion sustained.

The cause is remanded that this order may be complied with, with directions to tax the costs of the bill of exceptions against plaintiff in error.

JUDGMENT ACCORDINGLY.

THE other judges concur.

HERBERT C. JOINER, PLAINTIFF IN ERROR, v. W. L. VAN ALSTYNE ET AL., DEFENDANTS IN ERROR.

Conveyance: INSOLVENT GRANTOR. The mere fact that a grantor in a deed is insolvent will not render the conveyance of real estate made by him to a creditor upon adequate consideration fraudulent and void.

REHEARING of case reported 20 Neb., 578.

Dilworth, Smith & Dilworth and *A. H. Bowen*, for plaintiff in error.

C. O. Whedon, for defendant in error Doolittle.

MAXWELL, CH. J.

An opinion was filed in this case in 20 Neb., 578, a rehearing was afterward granted, and the cause again submitted to the court. The action was brought by the plaintiff against the defendant in the district court of Lancaster county to subject certain real estate described in the petition to the payment of a certain judgment recovered by the plaintiff against the defendant, Van Alstyne, in March,

1883. In May of that year an execution was issued on said judgment, which in July following was returned wholly unsatisfied. The debt upon which the judgment was recovered was created in 1873. The real estate in question was alleged to have been purchased by Wm. Van Alstyne in 1879, and the title taken in the name of his wife, Harriet E. Van Alstyne. It is alleged in the amended petition, "That Harriet E. Van Alstyne and William L. Van Alstyne did, on or about the 24th of October, 1884, convey the said premises above described to one John Doolittle, without consideration, and with the intent and for the purpose, as said John Doolittle then well knew, of delaying, hindering, and defrauding the plaintiff out of his said claim, and others, the creditors of said William L. Van Alstyne, out of their just demands and claims against him, the said William L. Van Alstyne. That at the time said John Doolittle purchased said premises, he, the said John Doolittle, well knew and had full knowledge that said premises belonged to and were owned by said William L. Van Alstyne, and that the legal title thereto was placed in the said Harriet E. Van Alstyne for the purpose of delaying and defrauding the creditors of said William L. Van Alstyne."

The testimony tends to show that on the 21st day of January, 1884, Van Alstyne and wife conveyed the property in controversy to the defendant, John Doolittle, and this action was commenced in February of that year; the deed to Doolittle, however, was not recorded until October, 1884. The testimony tends to show that the property at the time of the execution of the deed was worth about seven thousand dollars; that as part of the consideration Doolittle assumed the payment of three thousand five hundred dollars due from Van Alstyne to certain banks in Lincoln; he also assumed an incumbrance of about twelve hundred dollars on the property and satisfied an account of eight hundred and fifty dollars due from Van Alstyne to him;

he also executed a lease of said property to Van Alstyne for a period of two years. What other consideration there may have been does not appear.

The value of the lease we are unable to determine, as there is no proof upon that point. So far as the record discloses, the transaction was *bona fide*. The fact that Van Alstyne was insolvent at the time the transfer was made would not render the conveyance void as to creditors, unless it was made with the intent to hinder, delay, or defraud them, and the proof fails to show any such intent. It does appear that Van Alstyne had been a contractor in the construction of public buildings, and that Doolittle furnished him lumber and building material, but there is nothing to show that he had aided him to conceal his property or to evade the payment of his debts. The leased property was Van Alstyne's home, in which his wife and family resided, but whether he possessed \$500 in money or property in addition, we are unable to determine from this record. There is no error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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FRANK GREGG, PLAINTIFF IN ERROR, V. CARLTON E.
LOOMIS, DEFENDANT IN ERROR.

1. **Commissions to Real Estate Agent: ACTION: TRIAL.**
Where a real estate broker brought an action to recover commissions for a completed sale of real estate, and the testimony showed that he had merely procured a purchaser, who afterwards purchased such real estate from the owner, *Held*, That the action was one to recover upon a *quantum meruit*—the value of the services rendered, but as no objection had been made to the testimony, the judgment will be sustained.

2. ———: ———: JUDGMENT. Where an action was brought to recover commissions for effecting the sale of real estate, and the testimony shows that the broker merely procured a purchaser who purchased the premises from the owner, *Held*, That a judgment awarding the broker a less sum than the commission upon a completed sale will not be set aside.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

Ryan Brothers, for plaintiff in error.

J. R. Webster and *W. E. Stewart*, for defendant in error.

MAXWELL, CH. J.

This action was begun in the county court of Lancaster county, wherein, on March 20, 1886, judgment was rendered in favor of Loomis for \$87.50 and costs of suit.

The cause was appealed by Gregg to the district court of Lancaster county.

For cause of action the plaintiff below alleges in his petition that he was, during all the transactions hereinafter set forth, a real estate broker engaged in selling real estate upon a commission. That about January 1st, 1886, defendant Gregg employed plaintiff Loomis to solicit and find a purchaser for lot 6 in block 125, Lincoln, at the sum of \$2,500, and therefor promised to pay plaintiff a usual and reasonable fee and reward.

This plaintiff entered upon said employment and solicited one Smith to purchase said property, and exhibited said property to said Smith, and brought said Smith and said Gregg into negotiation, and such negotiation was finally, on or about the 1st day of March, A.D. 1886, consummated in the sale and conveyance of said premises to said Smith, whereby said Gregg became indebted to plaintiff Loomis in the sum of \$87.50, the reasonable and usual rate of commission.

Payment has often been demanded and refused. Wherefore Loomis, the plaintiff, prays judgment against defendant Gregg for \$87.50. The defendant in his answer admits he has paid nothing, and denies each and every allegation of said petition.

In November, 1886, the cause was tried in the district court of Lancaster county, a jury being waived, and the court thereupon found for defendant in error and rendered judgment against plaintiff in error for forty dollars and costs of suit. The plaintiff in error thereupon filed a motion for new trial, assigning as causes therefor :

1st. Error in the amount of the recovery, being too large a sum. 2d. That the decision is not sustained by sufficient evidence. 3d. That the decision is contrary to law. 4th. That the decision is erroneous in not being in favor of defendants. 5th. That the decision is erroneous in finding any sum due the plaintiff. The motion was overruled, to which plaintiff in error duly excepted. Defendant in error also filed his motion for a new trial on the ground of error in the assessment of the recovery in that the amount recovered was too small, for that upon the evidence he was entitled to recover \$87.50 and interest from the 9th day of March, 1886, and error of law duly excepted to at the time occurring at the trial of the cause. This motion was overruled, to which he duly excepted.

On the trial of the cause the plaintiff below testified : " My business is and was, during February and March, 1886, that of real estate, renting houses and selling real estate on commission. Gregg employed me in the first place. I sold Gregg lots five and six in the block 125, I believe for \$2,300. I then told them the lots were worth \$4,000, and that I would sell them for him at that price if he would let me do so. He said if I could get \$4,500 I might sell them ; he wanted that net. I said I did not sell lots that way ; if he would make me a price and stand

by it, I would sell the lots. So he made the price \$4,600; he said he would stand by that price and not interfere with my customers. It ran along probably a month or six weeks; I showed them to different ones, and finally I got a party to take them. I went and informed him what the customer said, that he only wanted one, but I had an idea that I could get them to take them both. He said, sell them, stick them to it. I said that he had got to stick to it if they came to him; he said, I will not do it, I will have nothing to do with them. It worked and worked along till I saw Gregg again and finally told him who the men were, gave their names, the Smith boys. I met them again in a short time and I said, they want only one lot, will you divide? He said, yes, and we will make the corner lot \$2,700, so the other will not be more than \$2,500; I said that is too much, there is no use in talking about it. He said he would sell it in that way. I said, that is too much, I can get \$2,500. He said he would sell it at \$2,500, and I said, will you stand by that? he said, I won't have a word to say; you sell it, they will have to deal with you. He left me, and got fifteen feet about, and said, you had better hurry up, other parties are working with the Smith boys for that lot. I said it don't make any difference, you know he is my customer; I have worked it up, and it is mine. After that he left, and I saw the Smith boys again, but could not get an offer of over \$2,500. I could not sell for \$2,600; I would not let them go at all, but finally the thing hung fire and he thought he could sell, so he closed the sale, and it's over here; he sold at \$2,500. I showed and introduced these buyers, Smith Brothers, to the lot; they drove by the lots twice in one day and noticed them. That day I seen them and impressed on their minds that they were the best lots they had seen, and asked them if they had seen these lots, and they said no."

On cross-examination he testified: "I was a witness in

this case on the trial in the county court; I rather think I was. On that trial I will swear I did not say that the only conversation I had with reference to this one lot was at the corner of O and Eleventh streets, when Mr. Gregg came along and I spoke to him about his price on one lot, whereupon he named \$2,700, and I told him that was too high, that he then said it must net him \$2,600; that then starting away, I said to him, I did not do business without a commission, and that was all that was said in relation to sale of one lot.

"On that trial I did not swear that I never had any conversation with either of the Smith boys about the sale of one lot, after the conversation I have spoken of, at the corner of O and 11th streets. I insisted all the time on the two lots all the time, till I asked Mr. Gregg if he would divide; then when he said he would divide, I went to the boys and talked one lot for \$2,600."

F. E. Gregg testified: "I am the defendant; Mr. Beecher was the owner of lots five and six, block 125, and McMurtry came to our office to sell them, and Mr. Keyser and myself purchased them jointly some time in December, 1885. Shortly after we bought the lots Mr. Loomis came to us and said: Don't you want to sell those lots? Our reply was, that we had bought and our intention was to build on them. We didn't know whether we wanted to sell them or not. He said, I can, I believe, sell them for \$4,500, possibly \$4,600. I had never been in Loomis' office, and when he again came, I said: If you bring us (I believe it was \$4,600 net) to us without expense, I don't think that I said we would make a warranty deed; any way, we would make a deed. He kept at it some time; finally I bought out Mr. Keyser's interest in the corner lot, and sold him my interest in the other; that passed to me the title of lot six, the corner one. Then my recollection of Mr. Loomis speaking about a single lot afterwards, was the time he spoke on the corner of Eleventh

Gregg v. Loomis.

and O streets ; I never went to his office ; he saw me on the street and called to me. He said : Will you sell that lot singly, referring to lot six on the corner. I said I did not know ; my wife talked of building on it. He said : What will you take for it? I said, I don't know, I might take \$2,700 ; that must be net to me. He said that was too high. I said, if you will bring me \$2,600 without expense to me and without any commissions, I will make a deed to the property ; that is all the conversation. It is possible he suggested what he said in his testimony before, that he could not take the property unless he got a specific commission ; my reply was, I would pay no commissions. That made an end to the matter, and he turned and went into his office. I don't think I saw Loomis again about that single lot ; I guess he did not take it very well because I said I would pay no commissions to anybody. Afterwards, I don't remember whether A. B. Smith came to me before or after the conversation ; I had no conversation with no other than Smith ; I think Smith came to me near the date, or shortly after we had transferred our interest, to see if I would sell the naked corner. He said : Will you sell the corner lot? I said, I don't know, what will you give? He said : What will you take? (Mr. Loomis' name was not mentioned.) I said I wanted \$2,700. He said, I cannot pay any such price, it is too much. We talked back and forth a good while, and then parted. Afterwards, he again asked me what I would take ; I said I would take \$2,600. Smith was away some time ; finally he saw me again and again asked me. I told him \$2,600 ; no, I said, I would not take \$2,500 ; he offered me that. I told him I would take \$2,560 ; he said no, he had concluded not to take the lot ; that he was figuring with another man to get a number of lots and build together ; so he said he was off on the lot, and did not want it at all ; I urged him hard to take it, and he would not. The matter stood that way for

some weeks, and then he said to me he would take the lot at \$2,500 ; so then I made the trade with him. This is the history of the transaction with Loomis about the sale of the lots, and either of them.

" When Loomis first came to speak about the lots, he remarked something of the kind, that I must not interfere with his sale. I don't think I had a conversation with Loomis about one lot, except the conversation at the corner of Eleventh and O streets, when he called me.

" I was present at the trial of this cause in the county court. Mr. Loomis said then that at the corner of O and Eleventh streets, he called me, and asked me if I would not sell the lots single, and what price ; that I told him \$2,700, which he said was too much, and I said I must have \$2,600 net to me ; that I made that provision, net to me. Then, that he said he could not do work without commission, and then went back into his office. My recollection is that he said that. Then he did nothing more in reference to selling that lot ; had no more conversation with A. B. Smith.

" Mr. Loomis, at another time, possibly a week or few days after this sale, called to me and said, you have sold that corner lot ; I said yes. He said if it was not sold he could sell the two together, at such and such a price. I think he said J. R. Webster wanted them ; that he would take them together at \$5,000 or \$5,500 ; would take them together. He said, could you not get them back from Smith ? I said possibly I could ; he said he would work with Mr. Webster. We could make the sale of the lots to one man this time. Mr. Andrus has made a claim for his services in showing this lot. Mr. McMurtry testified as to some conversation he had with me about these lots and about Loomis telling me to hold on or not do something with his customer at that time. I must say Mr. McMurtry is mistaken about that, I had no —" (question by McMurtry.) " Did you say that you did not come into

the office with Keyser and tell me that if Loomis did not sell you would?" (Witness) "I don't remember anything of that." On cross-examination he testified: "When I bought I had no guaranty that the lots would bring me ten per cent on the investment. Before I got the deed from Beecher, Mr. Loomis asked me what I would take for the lots, and I told him; I said so much net I would sell them. Keyser was interested, and was there, Loomis knew the fact. At the corner Loomis asked me what I would take for the lot. I did not know he had negotiated with Mr. Smith about the sale of this separate lot; I think possibly Mr. Loomis stated he had shown Mr. Smith these two lots, and that Mr. Smith would take them at that time.

"My recollection is that Mr. Smith spoke to me about the single lot before Mr. Loomis said anything about it, and Mr. Loomis did ask about the single lot down there on the corner. After that I sold it to Smith. It was more than a short time afterwards. I think we, Mr. Keyser and I, may have stopped in at McMurtry's office on our way to dinner, but it was about the two lots. I remember no such conversation as McMurtry states. At that time Keyser and I had not separated our interests. Possibly a negotiation was in progress with the Smith boys about the purchase of the two lots. I don't recollect saying I would sell them myself if Loomis did not close it up. It is among the possibilities I may have said so, but if you refer to the single lot, I will emphatically say I said no such thing. I don't remember suggesting to Smith I had been to see about it. I did not mention it. I will say, at that time I did not speak of \$2,600 as the price for lot 6, block 125, to Smith."

There is considerable testimony tending to corroborate that of both the plaintiff and defendant. It will thus be seen that there is a conflict in the testimony as to whether there was a contract between the plaintiff and defendant, and if so, its terms. All the testimony, however, tends to

show that the plaintiff below did not effect the sale of the lot in question, but only that he procured a purchaser at the price for which it was sold, when the owner of the lot stepped in and effected the sale. The action, therefore, properly is one for damages, and not for commissions on a completed sale. This objection, however, is not raised by either party, and will not be interposed by the court. This fact, however, doubtless had weight with the trial court in finding the amount due to the plaintiff below; that is, that as the plaintiff below had not performed all the labor necessary to complete the sale, he was entitled merely to the value of the services rendered—in other words, to recover upon a *quantum meruit*.

The proof as to the exact value of such services is not very definite, while the evidence is, the commission on the sum of \$2,500 would have been \$87.50. The court, therefore, seems to have apportioned the value of the services at a ratable proportion of the amount which the plaintiff below would have been entitled to recover had he completed the sale. This, while not admissible under the pleadings, was not objected to, and the objection therefore is waived, as error must affirmatively appear in order to justify the reversal of a judgment. The errors shown in the record are not sufficient for that purpose, and the judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

W. I. FISHER ET AL., APPELLEES, V. N. HERRON,
SHERIFF, APPELLANT.

92	183
96	131
22	183
33	201

DAVID BOGART, APPELLANT, V. B. F. AND W. I.
FISHER, APPELLEES.

22	183
43	545
22a	183
44	782
22a	183
54	778

1. **Fraud: TRANSFER OF PROPERTY TO RELATIVE.** Transactions between relatives, whereby property is transferred from one to another in payment of an alleged past due indebtedness, by reason of which creditors are deprived of their just dues, will be scrutinized very closely, and the *bona fides* of such transaction must be clearly established.
2. ———: **CREDITOR'S BILL.** Where an insolvent debtor has made an assignment of his property, the proceeds of which have been distributed among creditors, leaving a large amount unpaid, a creditor's bill filed by the assignee, or a creditor who has proved his claim, will inure to the benefit of all creditors who have established their claims against said assigned property.

APPEALS from the district court of Gage county. Tried below before BROADY, J.

T. D. Cobbey, for appellants.

Winter & Kaufman, for appellees.

MAXWELL, CH. J.

The partnership of Fisher, Murphy & Nye, of Wymore, was formed December, 1883, and was closed by a general assignment on October 31, 1884. The proceeds of the assigned stock paid the sum of thirty cents and eight mills on the dollar of the indebtedness. After the distribution of the proceeds various creditors brought actions against the individual members of the firm and obtained judgments for deficiency as follows: Sechler & Co., for \$115.90; Spiral Spring Buggy Co., \$77.20; L. M. Rumsey & Co., for \$36.36. Executions were issued on said judg-

ments out of the district court of Gage county on the 20th day of October, 1885, and on the 26th day of that month were levied on lots 3, 4, 5, and 6, in block 10 in Wymore's addition to Wymore, as the property of Benjamin F. Fisher, a member of said firm. Thereupon W. I. Fisher, Orpha R. Nye, and Eliza Bennett brought a joint action to enjoin a sale under said executions.

In June, 1886, a creditor's bill was filed by David Bogart to subject the same property to sale for the payment of a judgment confessed by the individual members of said firm for about the sum of \$900, being the balance remaining unpaid after his receipt of his share of the proceeds of said assigned firm property. His claim was for money loaned to the firm in June, 1884. These two actions—the one brought by appellees to make perpetual the injunction restraining the sheriff from selling said lots, and the other, brought by Bogart against the appellees to subject the same property to the payment of his judgment—were by stipulation tried together. In the former case the court found for the plaintiffs, W. I. Fisher, Orpha R. Nye, and Eliza Bennett, and in the latter case the court found generally for the defendants. From both of these judgments an appeal is taken to this court.

The question is the same in both cases, viz.: whether the property in question is liable for the debts of Fisher, Murphy & Nye. The testimony shows that B. F. Fisher, the member of the firm of Fisher, Murphy & Nye, and the grantor in the deed, is a brother of W. I. Fisher, the grantee therein, and that C. M. Fisher is also a brother, and received a note for \$1,100 from W. I. Fisher. The firm of Fisher, Murphy & Nye was engaged in the implement business at Wymore, and during June, 1884, borrowed from Bogart the sum of \$1,200 in cash, giving the firm note therefor, due in December following at ten per cent interest, but with a verbal promise of B. F. Fisher "to pay it on three days' notice if you need it." On the

15th of October, 1884, B. F. Fisher conveyed the lots in question to W. I. for the alleged consideration of \$1,200. Of this sum, it is claimed, he was indebted to W. I. in the sum of \$100 for labor performed in the years 1882 and 1883, and took his note for the balance, being \$1,100, due one year from date. This note B. F. afterwards transferred to C. M. Fisher for an alleged indebtedness of about that amount. The deed from B. F. to W. I. was not delivered to W. I., but was acknowledged by B. F. in Beatrice, and by him immediately thereafter placed upon record. It is unnecessary to review at length the very large amount of testimony taken in this case. It is sufficient to say that in our view it fails to show that W. I. was a *bona fide* purchaser for value. Transactions of this kind between relatives, whereby creditors are deprived of their just dues, will be scrutinized very closely, and it must be clearly made to appear that such transactions were entered into in good faith and the consideration actually paid without intent to hinder, delay, or defraud creditors. The testimony fails to establish the *bona fides* of the transaction, and the judgment of the district court in both cases is reversed.

2. The proceeds of the judgment, after the payment of all lawful expenses in recovering the same, when recovered are to be applied *pro rata* among all the creditors who have established their claims under the assignment, and although the action may be by one, it is for the benefit of all.

The decrees of the district court are reversed, and the causes remanded to the district court with directions to enter decrees in favor of the assignee and Bogart in conformity with this opinion.

JUDGMENT ACCORDINGLY.

THE other judges concur.

ROBERT WILKINSON, PLAINTIFF IN ERROR, v. JOHN M.
CARTER, DEFENDANT IN ERROR.

1. **Justice of Peace: DATE OF JUDGMENT: EVIDENCE.** In an action before a justice of the peace the trial was commenced on the 16th day of February, 1886, following the entry of judgment was the date, "Feb. 17th, 1886," *Held*, That an affidavit showing that the judgment was actually rendered at the latter date might be received, as such affidavit did not vary or contradict the record, but merely explained to what the date related.
2. **Costs: MOTION TO RETAX.** Before judgment for costs will be reviewed in the supreme court, there must be a motion to retax sustained or overruled, in whole or in part, by the trial court.

ERROR to the district court for Cass county. Tried below before CHAPMAN, J.

J. H. Haldeman, for plaintiff in error.

E. H. Wooley, for defendant in error.

MAXWELL, CH. J.

The defendant in error brought an action against the plaintiff before a justice of the peace to recover the sum of \$31.75 and interest. The plaintiff in error thereupon filed a claim of set-off for the sum of \$200 and sought an affirmative judgment. On the 16th day of February, 1886, a trial was had, the docket entry being as follows:

"Whereupon the following persons were sworn and gave their evidence for plaintiff: John M. Carter, Henry Carter, William Carter, and B. C. Yoeman; and on the part of defendant, Robert Wilkinson and A. E. Cochran. After hearing the evidence and argument of counsel on both sides, I find the plaintiff indebted to defendant in the sum of \$32.35. It is the judgment of this court that the defendant recover of the plaintiff the sum of \$32.35 and the costs of this action, taxed at \$14.35, judgment and costs, \$46.70.

22	186
39	520
30	733
22	186
141	238
22	186
42	869
23	186
53	761

Wilkinson v. Carter.

Plaintiff's witness fees: Henry Carter, \$1; William Carter, \$1; B. C. Yoeman, \$1; total, \$3. Defendant's witness fees: E. A. Cochran, \$1.80.

"Feb. 17th, 1886. "E. H. KING,
Justice of the Peace."

On the 27th of February, 1886, Carter filed an undertaking for appeal with the justice, which was duly approved. At the next term of the district court of Cass county a motion to dismiss the appeal was filed, as follows:

"JOHN M. CARTER,
Plaintiff,
vs.
ROBERT WILKINSON,
Defendant."

"Comes now the defendant, by his attorneys, and here moves the court to hold for naught, quash, and dismiss the pretended proceedings in appeal in this case, for reasons following:

"1st. Because no appeal bond has been filed as required by law.

"2d. Because the bond filed and approved shows by the record was not executed and approved and filed within the time required by law.

"3d. Because the record shows that the undertaking for appeal was not entered into within ten days from the rendition of the judgment.

"4th. Because no undertaking has been entered into to the defendant, within the time required by law."

In opposition to this motion the attorney of the defendant in error filed the following affidavit:

"JOHN M. CARTER,
vs.
ROBERT WILKINSON.
"STATE OF NEBRASKA,
CASS COUNTY." ss.

"E. H. Wooley, being first duly sworn, deposes and says that he was attorney for plaintiff in the above entitled

cause, when it was tried before C. H. King, justice of the peace.

"That said trial was begun on February 16th, 1886, as shown by the transcript, and that after the evidence was in and arguments of the counsel made, the court withheld its decision until the next morning, February 17th. That the date, February 17th, placed upon said justice's docket and shown in the transcript correctly states the time when said judgment was rendered, and the failure of the transcript to show formally that said justice withheld his decision from February 16th, 1886, the day of trial, until February 17th, was an error of the justice and was in no manner caused by the fault or negligence of the plaintiff or his attorney."

The court thereupon overruled the motion to dismiss, a trial was had in the district court, and judgment was rendered in favor of defendant in error for the sum of \$5.45, with costs taxed at \$104.61.

The principal ground upon which a reversal is sought in this court is error in overruling the motion to dismiss the appeal. It is claimed on behalf of the plaintiff in error that the affidavit of the attorney of the defendant in error cannot be received to show the actual date of the rendition of the judgment; in other words, cannot be received to contradict the docket entry. This is true. And if the affidavit in question contradicts the date of the entry on the docket, the court erred in considering it. We find the date, "Feb. 17th, 1886," at the foot of the docket entry, and parol evidence may be received to show that that date relates to the time such entry was made on the docket. The rule is frequently applied to supply an omission in a written contract, and in nowise trenches upon the general rule that the terms of a written contract cannot be changed or varied by oral testimony. *Goodrich v. McCleary*, 3 Neb., 123. In this case it was merely sought to show that the date made by the justice at the conclusion of the

Snyder v. Brune.

entry of his judgment was the date of the judgment itself. There was no error, therefore, in considering the affidavit above set forth.

It is probable that there should be a division of the costs, but this matter should be brought to the attention of the district court by a motion to retax, and until that has been done, the question will not be reviewed in this court.

The judgment of the district court is clearly right, and is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

22	189
32	110

J. F. SNYDER, PLAINTIFF IN ERROR, V. WILLIAM
BRUNE, DEFENDANT IN ERROR.

Exemption. Under the provisions of section 531 of the civil code, no property of a debtor is exempt from execution or attachment on a debt for laborer's wages ; while under the provision of section 531a, the wages of laborers who are heads of families are exempt from the operation of execution or attachment process. In an action by A against B, for wages, and in which a judgment was obtained, and whereon he sought to appropriate the wages of B by process in garnishment, B being the head of a family, and the wages sought to be appropriated having been earned within sixty days immediately prior to the service of process in garnishment, it was *Held*, That the wages of B were exempt. Section 531a having been enacted as an independent act, long subsequent to the passage of section 531, and being the last expression of the legislature upon the subject, must prevail.

ERROR to the district court for Lancaster county.
Tried below before POUND, J.

W. T. Stevens, for plaintiff in error.

J. C. Johnston, for defendant in error.

REESE, J.

This is a proceeding in garnishment instituted before a justice of the peace. The question involved is, are the wages of a laborer—who is the head of a family—earned within sixty days prior to the service of garnishee process, liable to garnishment in the hands of his employer for the satisfaction of a debt for the wages of another laborer? The provisions of the statute upon this subject are apparently contradictory. Section 531 of the civil code provides in substance that no property shall be exempt from execution or attachment for laborers' wages, while section 531a provides in substance that the wages of laborers who are heads of families shall be exempt from the operation of attachment, execution, and garnishee process. There is no exception of laborers' wages in either section. Evidently an oversight in the legislature.

Section 531, in some form, has been upon our statute books since 1859. By amendment it assumed its present form in 1870. Laws 1870, 6. In 1873 an act—consisting of section 531a—was passed by the legislature, the title of which is "An act to exempt laborers', mechanics', and clerks' wages in the hands of employers from execution, attachment, and garnishee process." The only effect of section 531, as it then was, and now is, was to provide for the enforcement of demands for wages. It was all in favor of the labor creditor, and no effort was made to protect the labor debtor from the enforcement of demands against him. The legislature, with this in view no doubt, passed the act of 1873, which, by terms equally as sweeping as the former act, not only declared that laborers' wages should be exempt from the "operation" of garnishee process, but that the act should not "be so construed as to *permit* the attachment of sixty days' wages in the hands of the employer." This latter act being the last expression of

Stanton & Co. v. Spence.

the legislature upon the subject, must stand, and wherein a conflict occurs, the former act must yield to it.

The judgment of the district court, being in accordance with these views, is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

J. H. STANTON & CO., PLAINTIFFS IN ERROR, V. JAMES G. SPENCE, CHARLES W. SPENCE, AND ELIZABETH SPENCE, DEFENDANTS IN ERROR.

1. **Practice in Supreme Court: ERROR: PRESUMPTION.** In a case brought on error to a district court, to reverse a judgment of that court reversing a judgment of a justice of the peace, and upon examining the petition in error to said justice of the peace and the record certified by him, it appears that there is reversible error assigned, it will be presumed by this court that it was upon such errors that the judgment of the justice was reversed, and not upon other errors assigned, which are believed not to be reversible.
2. **Justice of Peace: DEFAULT: TRIAL.** A judgment was rendered by a justice of the peace against S. and S., defendants. Within ten days R., attorney of S. and S., appeared before the justice, "offered to confess judgment for the costs in this case, and moved the court to set aside the default heretofore rendered in this case and set said cause for trial," which offer and motion was in writing and signed by attorney for the defendants. Whereupon the justice made the following entry in the docket of the case: "Motion sustained, default set aside, and trial set for the 8th day of May, 1886, at 1 o'clock in the afternoon of said day," signed officially by the justice. Notice being given thereof as provided by statute, on the 8th day of May, 1886, parties appeared, and on motion of plaintiffs the justice refused a new trial. *Held*, Error, and the judgment of the district court reversing the same affirmed.

ERROR to the district court for Cass county. Tried below before HAYWARD, J.

J. H. Haldeman, for plaintiffs in error.

S. F. Rockwell, for defendants in error.

COBB, J.

J. H. Stanton & Co. brought their action against James G. Spence, Charles W. Spence, and Elizabeth Spence, before C. H. King, a justice of the peace of Cass county. The defendants failing to appear as required by the summons, after waiting an hour, and they still failing to appear, their default was entered, and judgment rendered against them for the amount of the promissory note sued on with interest and costs.

On the same day, four hours after the rendition of said judgment, the defendants appeared by S. F. Rockwell, their attorney, and presented and filed the following paper:

"April 19, 1886, at 2 o'clock, P.M. Now comes the defendants, by their attorney, S. F. Rockwell, and offer to confess judgment for the costs in this case, and moves the court to set aside the default heretofore rendered in this case, and set aside cause for trial. S. F. Rockwell, attorney for defendants." Thereupon the said justice made the following entries in his docket: "Motion sustained, default set aside, and trial set for the 8th day of May, 1886, at 1 o'clock in the afternoon of said day." Thereupon notice of the setting aside of the judgment rendered by default, and for a new trial set for hearing on the 8th day of May, 1886, at 1 o'clock in the afternoon of said day, signed by S. F. Rockwell, attorney for the defendants, was served by the sheriff of the county on J. H. Haldeman, attorney for the plaintiffs, on the 20th day of April, 1886.

On the 8th day of May, at the hour set for trial, the parties appeared before the justice, and J. H. Haldeman, attorney for plaintiffs, filed the following motion: "Now come the plaintiffs by J. H. Haldeman, their attorney, and only appearing specially to object to the jurisdiction of the justice, and for no other purpose moves the said court to quash and hold for naught the proceedings pretending to set aside or open up the judgment heretofore rendered in the above entitled cause, on the 19th day of April, 1886, and to refuse a new trial for the following reasons:

"1. The judgment has never been set aside.

"2. The notice to plaintiffs, required by law, has not been given.

"3. The costs have not been paid by the defendants, and none of them have confessed judgment for costs as required by law.

"4. No judgment has been rendered against defendants for costs on confession.

"5. Conditions required by law to set aside the judgment and for a new trial have not been complied with by defendants, and the justice has no jurisdiction to again try the case.

"6. There has been no motion made by the defendants to set the judgment aside.

"7. More than ten days have elapsed since the judgment was rendered, and the judgment is still in full force." Signed by counsel.

Thereupon the justice made and entered the following proceedings: "Motion sustained. I find the judgment has not been set aside. The notice has not been given as the law requires. The costs have not been paid. Confession of judgment for costs has not been made. S. F. Rockwell had no authority to confess judgment for costs. Therefore, no judgment has been rendered against the defendant for costs. There has been no motion made on file to set aside the judgment. The conditions required by

law have not been complied with, and more than ten days have elapsed since judgment was rendered.

"Therefore adjudged and decided that the judgment heretofore rendered on April 19th, 1886, be and remain in full force and effect, costs taxed \$1.35 against defendants."

Signed by the justice:

On the 15th day of May, a transcript from the justice's docket containing the above statements and entries, together with a petition in error, was filed by the defendants in the district court. It is not deemed necessary to set out here the errors assigned in said petition in error. The said cause in error was regularly brought on to a hearing in the district court, and upon consideration thereof, the said judgment of the said justice was reversed.

And thereupon the said J. H. Stanton & Co. bring the cause to this court on error, and assign the following errors:

1. The court erred in reversing the judgment of the the justice of the peace.
 2. The judgment of the justice of the peace should have been affirmed, and defendants in error should have been adjudged to pay the judgments.
 3. The proceedings before the said C. H. King, justice of the peace, were regular and not erroneous.
 4. The justice committed no error in rendering judgment without security for costs being given, and the judgment for \$51.75 was not erroneous.
 5. The findings of fact before the justice were sufficient.
 6. The justice did not err in sustaining plaintiffs' motion, and in refusing a new trial, and the findings of the justice were proper and true.
 7. The district court erred in the premises, and the judgment of the justice of the peace is in all things correct.
- Section 1001 of the code of civil procedure provides that, "When judgment shall have been rendered against a defendant in his absence, the same may be set aside upon

the following conditions: *First*, That his motion be made within ten days after such judgment was entered. *Second*, That he pay or confess judgment for the costs awarded against him. *Third*, That he notify in writing the opposite party, his agent or attorney, or cause it to be done, of the opening of such judgment and of the time and place of trial, at least five days before the time, if the party resides in the county, and if he be not a resident of the county, by leaving a written notice thereof at the office of the justice ten days before the trial."

The first point made by plaintiffs in error in the brief of counsel is as to the errors assigned by plaintiff in error in the court below, defendant in error here, in his petition in error in the court below. As to that point it must be conceded that no error of the justice in the preliminary proceedings or in the rendition of the judgment could be availed of by the defendant in the justice's court in a proceeding based upon the section above quoted, but it must be presumed that the consideration of such error was rejected by the district court.

The next point is, that the justice was right in his refusal to grant a trial of the cause for the reason that the attorney had no power or authority to confess judgment for the costs. While it will not be contended that an attorney at law, as such, has the power to appear in an original case and confess a judgment against his client, without written authority from his client so to do, the point here presented raises quite a different question, and while I know of no authority in point, certainly we are cited to none, I think that an attorney at law, by virtue of his employment as such in the case, or an agent by virtue of a verbal employment as such, possesses ample authority to take all the steps on the part of a defendant contemplated by the section of the statute above quoted. Counsel cites the case of *Baker v. Kincherbocker*, 25 Kan., 289. The section of the statute of Kansas under which that case

arose contains, in addition to the provision of our statute, the following: "Third, That he file an affidavit that he has a just and valid defense to the whole or some part of the plaintiff's claim." The decision in that case was placed expressly upon the ground, not that such affidavit could not be made by the attorney in the case, but that the affidavit there presented was defective, as an affidavit by a person other than the defendant, in that it did not state nor was it shown in the case what the facts were which constituted the defense, nor that the affiant had any knowledge of such facts, nor why one of the defendants did not make the affidavit.

It cannot be denied that it is the letter of the law that the defendant "pay or confess judgment for the costs awarded against him," but the spirit of the provision is, in the opinion of the writer, that the judgment for costs must be paid, or allowed to stand, as awarded against the defendant, while the body of the judgment will be conditionally set aside or opened up. The assent to this by the defendant, in person or by his attorney or agent, is all that is required in substance. Can it be doubted that the justice could, lawfully, have issued execution against the defendants for the costs awarded against them, immediately upon his sustaining the motion to set aside the default? I think not; and if that could have been done, then the purpose of the statutory provision was sufficiently subserved.

It is also contended that the justice "pretended to set the judgment aside, but not conditionally," that "this he had no jurisdiction to do. Hence all of his acts after judgment were a nullity." On the contrary, the apparent objection to the entry made by the justice in his docket is that he did not, in the terms of the statute, set aside the judgment even conditionally. I copy the following from the justice's transcript:

"April 19, 1886, at 2 o'clock P.M., now comes the defendants by their attorney, S. F. Rockwell, and offers to

confess judgment for the costs in this case, and moves the court to set aside the default heretofore rendered in this case and set said cause for trial.

“(Signed)

S. F. ROCKWELL,

“Attorney for Defendants.”

“Motion sustained, default set aside, and trial set for the 8th day of May, 1886, at 1 o'clock in the afternoon of said day.

“(Signed)

C. H. KING,

“Justice of the Peace.”

While these papers can neither of them be commended as models to be followed by parties or justices, yet they do contain the substance both of the application and the order contemplated by the statute. The defendants had been sued before the justice and summoned to appear at 9 o'clock A.M., had failed to appear within the hour provided by law, and, as the justice recorded in his docket, “thereby making default,” and such proceedings were had in the absence of said defendants that a judgment was rendered against them for \$51.75, debt or damages, and \$4.90, costs of suit. Four hours later the defendants appear before the justice and file the paper above copied. Can there be any doubt of their meaning, desire, and intention to avail themselves of the benefit of the provision of law contained in the section of statute hereinbefore quoted, to the end that they might make their defense and have a trial upon the merits? Or can there be any doubt that the justice so understood them and aimed to discharge his duty in the premises, and give defendants the benefit of the statute? While justices of the peace or other courts of limited jurisdiction will be held strictly to the jurisdiction and powers conferred upon them by law, yet in matters of form and mere method great latitude must be allowed them.

The notice appears to have been issued in due form, and properly and timely served, and I think on the day set by

the justice for that purpose, and named in the notice, he should have proceeded to the trial of the cause, and that his action on that day in reversing his own proceedings, his findings in respect thereto, and denying a new trial, were erroneous.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

29	198
33	400
29	198
31	190
22	198
33	792

J. H. CLAPP, PLAINTIFF IN ERROR, V. BOWMAN &
WARE, DEFENDANTS IN ERROR.

1. **Bill of Exceptions: AFFIDAVITS.** An affidavit used in resistance of a motion to dismiss an appeal on the ground that the transcript, etc., of the proceedings before the justice were not presented to the clerk of the district court within the time required by law cannot be considered in this court on a proceeding in error to the district court to reverse its judgment sustaining such motion, and dismissing the appeal, unless such affidavit is preserved by bill of exceptions and so made a part of the record.
2. **Appeal from Justice of the Peace: FILING TRANSCRIPT.** Sections 1008 and 1011 of the code of civil procedure, as the same stood prior to the amendment of the latter section by the act of 1887, being *in pari materia*, must be construed together, and being so construed together, *Held*, That the transcript of the proceedings before the justice of the peace not having been presented to the clerk of the district court until after the second day of the term of the district court next after such appeal, and more than thirty days having elapsed since the rendition of the judgment appealed from before the filing of such transcript, the dismissal of such appeal by the district court was right, and must be affirmed.

ERROR to the district court for Gage county. Tried below before BROADY, J.

Burke & Prout, for plaintiff in error.

Hazlett & Bates, for defendant in error.

COBB, J.

This case arose upon appeal to the district court of Gage county from the judgment of a justice of the peace. Bowman & Ware sued Clapp & Brubaker in justice's court, and upon issue joined and trial to a jury recovered a judgment against them on the 30th day of June, 1885, and it appears from the transcript that an appeal bond, with surety which was approved by him, was filed in the office of the justice on the 10th day of July following. A transcript of the proceedings before the justice was filed with the clerk of the district court on the 21st day of September following. On the 10th day of October following Bowman & Ware appeared in the district court and moved to dismiss the appeal, for the reason that the transcript and papers in the lower court were not filed in the district court within the time provided by law. This motion was finally sustained and the appeal dismissed, which judgment the defendant and appellant, Clapp, brings to this court on error, assigning for error the sustaining by the district court of the said motion, the dismissing of the said appeal, and striking the said cause from the docket.

Upon the cause being docketed in this court the defendants in error filed a motion to strike from the files of the case a certain affidavit and exhibits thereto, for the reason that the same had not been made a part of the record by bill of exceptions.

In disposing of the case the consideration of this motion comes first in logical sequence. There is no bill of exceptions in the case, and so, as nothing has been added to the record by order of the court, it is obvious that no paper not appertaining to the record proper is entitled to a place

therein, or to be considered in disposing of the questions involved.

In the case of *Tessier v. Crowley*, 16 Neb., 369, the present writer, in the opinion of the court, said: "I don't think that anything can be said to belong to the record except the process, pleadings, and journal entries, including, of course, motions, the rulings thereon, references, reports of referees, instructions, verdicts, and judgment. Any matter of evidence, including affidavits, can only go upon the record by order of the court, and that is the office of a bill of exceptions." In the same case we cited seven cases wherein this court had distinctly held that, "Where evidence has been introduced in the court below which is not properly a matter of record, a party who desires to avail himself of such evidence in the supreme court must preserve the same by a bill of exceptions." We also cited the only case wherein this court had expressed an opinion in conflict with the above cases, which latter opinion we declared not to be law, as we understood it. Since the above case, in the sixteenth volume of our reports, the point has been presented to this court in at least six cases, cited by counsel for defendants in error, in all of which the opinions have been in harmony therewith, and the rule of those cases cannot be departed from now. The motion must therefore be sustained.

Plaintiff in error contends that even if the motion to strike the affidavit and exhibits from the files prevails, there is still error in the record calling for a reversal of the judgment.

The statute relating to appeals from justices of the peace, among other things, provides as follows: "Sec. 1008. The said justice shall make out a certified transcript of his proceedings, including the undertaking taken for such appeal, and shall, on demand, deliver the same to the appellant or his agent, who shall deliver the same to the clerk of the court to which such appeal may be taken,

within thirty days next following the rendition of such judgment; and such justice shall also deliver or transmit the bill or bills of particulars, the depositions, and all other original papers, if any used on the trial before him, to such clerk on or before the second day of such term," etc.

Section 1011, at the date of these proceedings, provided as follows: "Sec. 1011. If the appellant fail to deliver the transcript and other papers, if any, to the clerk, and have his appeal docketed as aforesaid, on or before the second day of the term of the said court next after such appeal, the appellee may, at the same term of said court, file a transcript of the proceedings of such justice, and the said cause shall, on motion of the said appellee, be docketed; and the court is authorized and required on his application either to enter up a judgment in his favor, similar to that entered by the justice of the peace, and for all costs that have accrued in the court, and award execution thereon; or such court may, with the consent of such appellee, dismiss the appeal at the costs of the appellant, and remand the cause to the justice of the peace to be thereafter proceeded in as if no appeal had been taken," etc.

In the case of *Roesink v. Barnett*, 8 Neb., 146, these two sections of the code were construed together, and it was there held that even if section 1008 was applicable to that case, it having become a law between the date of the taking of the appeal and the expiration of the time required for its filing under its terms, "still, as section 1011 of the code had not been changed, a failure to file the transcript, unless continued beyond the second day of the next succeeding term, could not prejudice an appeal otherwise regularly taken." The law thus stated was followed in the subsequent case of *Monell & Lashly v. Terwilliger*, Id., 360.

Applying this rule to the case at bar, then, the decision must depend upon the fact whether the failure to file the transcript was continued beyond the second day of the next succeeding term of the district court. This court

will take judicial cognizance of the time fixed under the provisions of law for holding the regular terms of the district courts in each county of the state. The time fixed under such provisions of law for holding the fall term of the said court of Gage county for said year, 1885, was Monday, September 14th, so that the second day of the term next succeeding the taking of the appeal in the case at bar was Tuesday, September 15th; and it necessarily follows that at any time after said last named day it was competent for the court, on motion of the appellees, to dismiss the appeal.

While the above is conclusive of the case, it may not be out of place to say that among the papers stricken from the files for the reason that they had not been made a part of the record by bill of exceptions, is a certified copy of a journal entry showing that the district court met on the 14th day of September in regular session, on which day, upon the petition of the members of the bar of Gage county, the term was adjourned to Monday, the 21st day of said month, and counsel for plaintiff in error contend that in consequence of the said adjournment, Tuesday, the 15th, was not a day of said term at all, and so cannot be treated as the second day of the term, but that Monday, the 21st day of the month (the court only having been held one day previous thereto), should be held to be the second day of the term, and the transcript having been filed on that day, the appeal was perfected in time.

This precise point was presented to the supreme court of Ohio in the case of *Lindsay v. Thompson*, 10 O. S., 452, under a statute of which ours is a copy, and upon facts substantially the same as those of the case at bar, and the judgment of the court of common pleas dismissing the appeal was affirmed.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

ROBERT WALLACE, PLAINTIFF IN ERROR, V. DORA
FLIERSCHMAN, DEFENDANT IN ERROR.

1. **The Evidence examined, and Held,** To sustain the findings of the trial court.
2. **Costs.** In all actions, motions, and proceedings in the district court the costs of the parties should be taxed and entered on the record separately.

ERROR to the district court for Cass county. Tried below before CHAPMAN, J.

H. D. Travis, for plaintiff in error.

E. H. Wooley, for defendant in error.

REESE, J.

This action was for the enforcement of a mechanic's lien. Plaintiff being unsuccessful in the district court, prosecutes error here. The petition was in the usual form. The answer contained averments to the effect that the building, for the construction of which the alleged indebtedness was made, was constructed by plaintiff and one Lehman, who were partners, and that the whole indebtedness had been paid. The district court found these allegations sustained by the proof. There seems to be no doubt but that the money due for the construction of the building has all been paid, but it appears that the principal part of it was paid to Lehman, who, defendant insists, was a partner of plaintiff in doing the work, while plaintiff contends that Lehman was not a partner, and was only entitled to collect such proportion of the contract price as the time worked by him sustained to the whole time engaged in the construction of the improvement.

We have carefully read all the testimony, and, while it

is not so definite and direct on the part of defendant as might be desired, we are quite clear that there is enough to sustain the finding of the trial court. It could serve no good purpose to review the evidence at length. It must be sufficient to say that if the testimony of defendant was true—and of that the district court was the judge—it was sufficiently proven that the contract for the erection of her house was originally let to Lehman for the sum of \$115, but plaintiff afterwards claimed that the price was too low, and it was increased to \$130, and that the principal part of the money paid to Lehman was divided between him and plaintiff, the receipts therefor being given in the firm name of Lehman & Wallace. The finding, therefore, can not be molested.

After judgment plaintiff moved the court to order a re-taxation of the costs, and that they be separately taxed, as required by law. This motion was overruled. The judgment itself is correct in form, "That defendant recover her costs." But, as is shown by the record, the clerk entered up all the costs in one general fee bill, without taxing them separately, as required by section 30 of chapter 28 of the Compiled Statutes.

The duty of the clerk is plain in this matter, and had the attention of the trial court been called to the fact we doubt not he would have directed the clerk to follow the statute, but it was not done, and as the matter was presented by the motion it should have arrested the attention both of the court and clerk. The result is, no doubt, an oversight, but it is erroneous, nevertheless.

The decree of the district court upon the merits of the cause is affirmed, but the order on the motion to require the clerk to separately tax the costs is reversed and the cause remanded, that the requirements of the statute may be complied with.

JUDGMENT ACCORDINGLY.

THE other judges concur.

DAVID MAY, PLAINTIFF IN ERROR, v. SCHOOL DISTRICT
No. 22, OF CASS COUNTY, NEBRASKA, DEFENDANT
IN ERROR.

1. **Limitation of Action:** SCHOOL DISTRICT. The legal maxim, "Lapse of time does not bar the right of the state," can only apply in favor of the sovereign power, and has no application to school districts or other municipal corporations deriving their power from the sovereign. The statute of limitations runs for or against school districts in the same manner as it does for or against individuals.
2. ———: ———. The case of *Brewer v. Otoe County*, 1 Neb, 373, commented upon and distinguished.

ERROR to the district court for Cass county. Tried below before POUND, J.

E. H. Wooley, for plaintiff in error.

H. D. Travis, for defendant in error.

REESE, J.

This action is founded upon a school district warrant or order, issued by the director and moderator of defendant, for \$75.00, dated September 9th, 1879, payable eighteen months after date. It is conceded that the warrant became due more than five years prior to the commencement of the suit, and that if the statute of limitations applies to school district warrants, the action cannot be maintained.

Section 10 of the civil code provides that civil actions can only be commenced within five years upon a specialty or any agreement, contract, or promise in writing. It is contended upon the strength of the decision in *Brewer v. Otoe County*, 1 Neb., 273, that the statute of limitations does not apply to the indebtedness of municipal corporations.

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43	527
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44	790
22	206
459	642

In *Woods on Limitations*, section 53, it is said: "The maxim '*nullum tempus occurit regi*' (lapse of time does not bar the right of the crown) only applies in favor of the sovereign power, and has no application to municipal corporations, deriving their powers from the sovereign, although their powers, in a limited sense, are governmental. Thus the statute runs for or against towns and cities, in the same manner as it does for and against individuals."

Argument need not be prolonged upon this question; we shall be content with citing the following: *Cincinnati v. Evans*, 5 O. S., 594. *Lane v. Kennedy*, 13 Id., 42. *Cincinnati v. Church*, 8 O., 298. *School Directors v. Georges*, 50 Mo., 194. *Kennebunkport v. Smith*, 22 Me., 445. *Clements v. Anderson*, 46 Miss., 581. *Evans v. Erie Co.*, 66 Pa. St., 222. *St. Charles Co. v. Powell*, 22 Mo., 525. *Callaway Co. v. Nolley*, 31 Id., 393. *Abernathay v. Dennis*, 49 Id., 469. *Pemental v. San Francisco*, 21 Cal., 351. *Clarke v. Iowa City*, 20 Wall., 583. *De Cordova v. Galveston*, 4 Tex., 470. *Underhill v. Trustees*, 17 Cal., 172. *Baker v. Johnson Co.*, 33 Ia., 151. 2 Dillon on Mun. Corp., § 668.

The questions discussed in *Brewer v. Otoe County*, *supra*, by Judge Lake, in writing the opinion of the court, do not arise in this case. That decision is based almost entirely upon statutes relating to county warrants. In referring to the section of the code above mentioned, the learned judge says: "This provision applies as well to actions where counties or other municipal corporations are parties as between private persons. The law recognizes no distinction in suitors, but is the same rule unto all."

In the case at bar, the warrant or order upon which the suit is founded was never audited by the board, as such, but was signed by the officers separately. Hence no question of judicial action on the part of the board can arise.

Holmes v. Shimer.

The judgment of the district court being in favor of defendant is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

ALBERT G. E. HOLMES AND RUBY L. HOLMES, MINOR
HEIRS OF ANNA J. HOLMES, DECEASED, BY LEONIDAS
K. HOLMES, GUARDIAN AND NEXT FRIEND,
PLAINTIFFS AND APPELLANTS, V. F. A. W. SHIMER,
GEORGE WALKER, ANDREW J. SAWYER, AND
WINONA S. SAWYER, DEFENDANTS AND APPELLEES.

Fraud: TRIAL: CONFLICTING TESTIMONY. Plaintiff alleged in his petition that he had employed defendant S. as agent to purchase certain real estate, for a given price; that under such employment S. purchased the property for a less price than he was directed to give, and caused the title to be conveyed to a third party, who was an intimate friend; that soon thereafter the holder of the legal title conveyed it to S., who, for the purpose of deceiving plaintiff, withheld his deed from record and suppressed the fact of the purchase from plaintiff. The allegations of agency and fraudulent intent and action were denied. In an action against S. for a conveyance of title to plaintiff it was held that the controlling question in the case was one of fact: Was S. employed by H. as his agent for the purchase of the property? The finding of the trial court upon this question, upon a sharp conflict of testimony, being in favor of defendants, is decisive of the case.

APPEAL from the district court of Lancaster county.
Tried below before POUND, J.

J. R. Webster and *L. W. Billingsley*, for appellants.

Andrew J. Sawyer, for appellees.

REESE, J.

The substance of the petition in this case is, that Anna K. Holmes (who was the mother of plaintiffs and the wife of Leonidas K. Holmes, their guardian), now deceased, on the 15th day of August, 1877, leased from defendant Walker lot 4 in block 89 in the city of Lincoln, for the term of ten years, the contract of lease providing that at the end of the term the permanent improvements and the lot should each be separately appraised, and that Walker should have the option to purchase the improvements at the appraised value if he so desired. In case he declined to so purchase, the lessee should have the right to purchase the lot at its appraised value if she so elected. If neither party purchased, the improvements should be forfeited to Walker. That she took possession of the property and placed a brick dwelling-house thereon of the value of \$5,000, and which could not be removed without destroying it. That after the death of Anna J. Holmes, Leonidas K. Holmes sought to purchase the title and reversion of said premises from said Walker, and to that end employed defendant Andrew J. Sawyer as his agent to negotiate and perfect such purchase, at the least price for which it could be purchased, not to exceed \$1,400, and directed him to offer no more than \$1,000 in the first instance. For these services plaintiffs, by said Leonidas, agreed to pay Sawyer a reasonable compensation, and Sawyer entered upon said employment. That said Sawyer purchased said property of Walker for the sum of \$600, but instead of having it conveyed to plaintiffs he caused the deed to be made to defendant Shimer, an intimate friend, and withheld from plaintiffs all knowledge of said purchase. That Shimer, soon after receiving the title to said property, conveyed it to defendant Sawyer, who withheld his deed from record, and thereby secretly held the title. That upon learning the facts, plaintiffs, by their guardian, had demanded a conveyance from

Sawyer, but that he refused to convey, notwithstanding the purchase price had been tendered to him, and the tender kept good. The purpose of the action is to compel a conveyance from Sawyer to plaintiffs.

The defendants Shimer and Sawyer admit the lease and the conveyance to Shimer, and from her to Sawyer, but deny all allegations of the agency of Sawyer or his employment by plaintiffs to make the purchase, as alleged in the petition; but allege that he was the agent of Walker for the collection of rent from plaintiffs and for the sale of the property, and, on repeated occasions, sought to induce plaintiff to purchase the property, but that he declined to do so. The reply is a general denial of the allegations of the answer, except one averment that Leonidas K. Holmes had stated to Sawyer in 1885 that he had concluded to purchase the property. The petition and answer are quite voluminous, and many facts and circumstances are stated at great length and with much particularity, but it is thought that the foregoing contains a fair statement of the vital issues in the case.

The cause was tried to the district court, and the finding being in favor of the defendants, and decree dismissing the bill, plaintiffs appeal.

As we view the case, there is one controlling question presented by the testimony. That is, was Sawyer the agent of the plaintiffs for the purchase of the property in question? If he was, and secretly took a conveyance to himself, it is quite probable that plaintiffs would be entitled to the relief prayed; if not, the decree of the district court is correct. This question of fact was submitted to the trial court upon as sharp a conflict of testimony as could well be presented.

The testimony of Leonidas K. Holmes is direct and positive as to the employment and his consultations with and reliance upon Sawyer as his agent. In some respects he is corroborated, as well by circumstances as by the tes-

timony of other witnesses upon collateral facts. Upon the other hand the testimony of Sawyer is as direct and positive that there was no employment, and in this he is corroborated, probably to the same extent as is Holmes. Were the cause before this court in the exercise of an original jurisdiction, grave doubts might arise as to what would be the proper conclusion. But such doubts are dispelled by the reflection that the jurisdiction is appellate, and that the decision of the trial court is entitled to consideration, the witnesses having been before it and subjected to examination in its presence. No good could result from a review of the testimony of each witness, for the conclusion must of necessity be the same. It must be sufficient to say that we have carefully examined the testimony and find sufficient to sustain the decree.

It follows that the decree of the district court must be affirmed.

DECREE AFFIRMED.

THE other judges concur.

JAMES W. WILLIAMS, PLAINTIFF IN ERROR, V. JAMES C. EIKENBERRY, DEFENDANT IN ERROR.

1. **Replevin: ALTERNATIVE JUDGMENT.** Where in an action of replevin judgment in the alternative form is rendered against the plaintiff, and on execution being issued, he points out to the coroner having the execution, the property in dispute, with the request that he accept the return of the property in accordance with the judgment, which request the coroner, by direction of defendant's attorney, refuses, and by the order of such attorney returns the execution not satisfied, for want of property whereon to levy; and plaintiff files with the clerk of the court in which the judgment was rendered an offer to return the property, and which offer is accepted upon condition

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that *all* the property is returned by plaintiff to defendant, but the offer is attempted to be withdrawn soon after the filing of the acceptance, it was *Held*, Upon a plea in abatement to proceedings in error prosecuted in the supreme court by plaintiff, that the filing of the offer and of the conditional acceptance did not constitute a waiver of error by plaintiff nor satisfy the judgment, the conditions of the acceptance not being agreed to.

2. ———: ATTACHMENT. Where an officer attaches property which is subsequently replevied from him by a stranger, who claims title and the right to its possession, and such officer seeks to justify his possession under his attachment process, it is incumbent upon him to prove his authority by the order of attachment, in order to show his right to possession, and the measure of his damages, if successful in the suit.
3. ———: ———. In an action of replevin against a sheriff who had levied upon the property in controversy, the sheriff, by his answer to the plaintiff's petition, denied generally the allegations of the petition and also plead affirmatively his official character, and justified the seizure under an order of attachment, alleging the ownership of the property to be in the attachment defendant. It was *Held*, That the defenses were not inconsistent, and that the decision of the trial court in overruling a motion to require defendant to elect upon which of the defenses set up in his answer he would proceed to trial was correct.
4. Trial: SPECIAL FINDINGS OF JURY. Special findings of a jury must be consistent with each other upon material questions, and inconsistent with the general verdict, before a trial court will be justified in rendering judgment upon them, rather than upon the general verdict.

ERROR to the district court for Cass county. Tried below before CHAPMAN, J.

J. H. Haldeman and Beeson & Sullivan, for plaintiff in error, on necessity that officer prove his authority to attach, cited: *Oberfelder v. Kavanaugh*, 11 Neb., 483. *Mathews v. Densmore*, 43 Mich., 461. Wait Fraudulent Conveyances, Sec. 297. Inconsistent defenses. *Derby v. Gallup*, 5 Minn., 119. Maxwell's Pl. and Pr., 132. *Adams v. Trigg*, 37 Mo., 141. Special findings in verdict. *National Bank v. Peck*, 8 Kan., 660. *Harbough v. Cicott*, 33 Mich., 241.

E. H. Wooley, H. D. Travis, and Covell & Polk, for defendant in error, cited: *Levi v. Darling*, 28 Ind., 498. *Martin v. Watson*, 8 Wis., 315. *Howland v. Fuller*, 8 Minn., 50. *Wells on Replevin*, Sec. 168. *Jenks v. Burr*, 56 Ill., 451. 2 *Greenleaf Evidence*, Sec. 600. 2 *Kent Com.*, 508.

REESE, J.

This is a petition in error, by which it is sought to reverse the judgment of the district court of Cass county in an action in replevin wherein plaintiff in error here was plaintiff and defendant in error was defendant. Judgment being in favor of defendant in the action, plaintiff seeks review.

The first question requiring notice is a plea in abatement filed in this court by defendant in error, by which he seeks to show that all errors which may appear in the record, if any should so appear, have been waived by plaintiff in error by an offer made by him to return the property to defendant, after judgment and after execution issued.

From the record before us it appears that the judgment was in the statutory alternative form for a return of the property, or for its value in case a return could not be had. (Sec. 191 a, civil code.) This judgment was rendered on the 4th day of February, 1887. On the 4th day of the following March an execution was issued, commanding the sheriff to cause to be made the sum of \$1,739.70, together with the costs of suit. Whether or not the execution should have followed the judgment, in form, requiring the return of the property, "or the value thereof in case a return cannot be had," as expressed in the section of the code above referred to, is not before us. On the 11th day of March, plaintiff in error filed in the office of the clerk of the district court a written offer, of which the following is a copy, omitting the title of the cause, signature, and other formal parts :

"The plaintiff hereby returns to the defendant the property in controversy in this action, as per the judgment for the return thereof, said property, lumber, building material, still at the same place in Manley, Nebraska, where it was when taken by plaintiff on writ of replevin issued herein."

On the 12th of March, the execution was returned, no property found on which to levy, "except the plaintiff's lumber yard, which was of the value of about \$1,200, and upon which defendant requested no levy to be made, and ordered return of this writ." On the 28th day of April, at 8 o'clock in the morning, defendant filed in the office of the clerk of said court, the following:

"Comes now the defendant in this cause and hereby accepts the offer made and filed in this cause by the plaintiff to return the property replevied in this cause in case the plaintiff has all the property so replevied herein, and in case all of the property so replevied is returned by the plaintiff to the defendant." On the same day, but ten minutes later (8:10 A.M.), plaintiff filed an affidavit withdrawing the offer. The motion for leave to withdraw the offer was overruled by the district court. It is now urged that the offer, the acceptance, and ruling of the lower court upon the motion to withdraw must be treated as an end to the case. That the accepted offer to comply with the judgment is a waiver of errors, if any exist, and the cause can not now be reviewed on its merits. As is shown by the return of the officer, he was ordered to return the execution without molesting the lumber yard, the property in dispute, and by an affidavit it is shown that when the coroner appeared at the residence of plaintiff with the execution, accompanied by defendant's attorney, plaintiff pointed out the replevied property, and requested that the coroner take the same, but that the defendant's attorney refused to permit the officer to do so, and insisted upon collecting the judgment for money.

We do not think it necessary to inquire further into the

effect of these proceedings than is required to ascertain the effect of the offer and acceptance, as shown by the papers filed with the clerk of the district court. In this inquiry, we may assume, but not decide, that the offer, if accepted, would have the effect of satisfying the judgment. But that is not the case at bar. The acceptance is clearly based upon the condition that plaintiff should have "all the property so replevied," and that "all the property so replevied is returned by plaintiff to defendant."

The property in dispute is "a certain lot of lumber and posts, building material, fencing boards, and different kinds of lumber, and Victor platform scales," constituting what is known as a lumber yard, the value of which, as ascertained by the jury, was \$1,739.70. The condition of the acceptance being that plaintiff should have *all* of the property "so replevied," and that it should *all* be "returned to defendant" by plaintiff, would seem to be intended as a refusal of the offer made, or rather an acceptance upon an impracticable, if not an impossible condition. This is quite apparent, since the proposed return had been refused some time previous, and the property being of a class which is made up of many parts, consisting of classification by quality and quantity, rather than by the specific article itself. For instance, speaking of lumber, a certain number of feet, equivalent to that taken, and of the same class and value, would have to be considered as the same as taken where the property in dispute was known by the common name of "lumber yard," kept for the purpose of trade.

After the offer to the coroner to return the property was rejected by plaintiff, it could not be expected that every piece of material was kept intact upon the supposition that plaintiff might change his mind and afterwards accept it. The offer was to return the property "still at the same place in Manley, Nebraska, where it was when taken by plaintiff," and "as per the judgment for the return thereof," being equivalent to the offer previously rejected. It

is not necessary to enquire what the effect would have been had defendant accepted the offer unconditionally as made, for he did not do this. He required the property to be returned by plaintiff to defendant, a thing which he was clearly under no obligation to do, after the offer to do so had been rejected.

It is said in defendant's brief that "the tender was accepted and the controversy as to the ownership or possession of the property between the parties to the suit, was at an end." A tender, to be effectual, must be without condition. *Tompkins v. Batie*, 11 Neb., 147. Without doubt the acceptance must be equally unconditional.

The ruling of the court upon the motion for leave to withdraw the offer from the files can have no effect upon the case, for, whether withdrawn or not, it was not accepted.

There are a number of alleged errors argued by plaintiff, but as a new trial must be given upon one, we will notice only such as may probably occur on a re-trial of the cause.

The one error to which we refer as requiring a reversal of the judgment is, that the verdict of the jury was not sustained by sufficient evidence. The property in dispute was replevied from the sheriff of Cass county, by plaintiff, who claimed to be entitled to its possession by reason of a part ownership, and a pledge or mortgage of part, as alleged in his petition. By his answer defendant denied the allegations of the petition and alleged that he was the sheriff of the county, and had seized the property as the property of Lawrence Holland, by virtue of an order of attachment issued out of the district court of Cass county, at the suit of the Commercial Bank of Weeping Water against said Holland, and that Holland was the owner of the property. The reply was, in substance, a general denial. There was no proof on the trial tending to show any justification of the sheriff in seizing the property. No proof was made that any order or writ of attachment had

ever been issued, and none was introduced in evidence, and, of course, there was no proof of the value of defendant's possession.

In *Oberfelder v. Kavanaugh*, 21 Neb., 483, S C., 32 N. W. R., 296, Judge Cobb, in writing the opinion of the court, quotes with approval the following from Drake on Attachment: "When the officer attaches property found in the possession of the defendant, he can always justify the levy by the production of the attachment writ, if the same is issued by a court or officer having lawful authority to issue it, and be in legal form. But when the property is found in the possession of a stranger, claiming title, the mere production of the writ will not justify its seizure thereunder; the officer must go further, and prove not only that the attachment defendant was indebted to the attachment plaintiff, but that the attachment was regularly issued." He also cites a number of authorities which support the proposition. By this rule it is very clear that the officer levying the writ and seeking to hold the property in replevin proceedings against him, must at least prove his right by the introduction of the writ, which could be his only authority for the seizure. There was some proof that plaintiff was in the actual possession of the property by his alleged right of ownership prior to and at the time of the levy of the attachment, and that defendant was informed of the fact. The attachment being against a third party, in whom defendant alleged ownership, the rule above stated would have required proof "not only that the attachment defendant was indebted to the attachment plaintiff, but that the attachment was regularly issued."

As decided in *Welton v. Beltezore*, 17 Neb., 399, if defendant had the right of possession it could only extend to the amount due on his process. If that was less than the value of the property it would limit the amount of his alternative judgment. If greater, his recovery should be the value of the property. There being no proof as to the

extent of his right of possession, if any right existed, the verdict and judgment are not sustained by the evidence.

It is claimed by plaintiff in error that the court erred in overruling his motion to require defendant to elect upon which ground of defense set up in his answer he would proceed to trial. The answer consisted of a general denial and a count alleging his official capacity and justification under attachment process. In the ruling upon this motion the court did not err. The second defense stated in his answer was perhaps unnecessary, as under a general denial defendant might prove any special matter of defense, whether merely negative, by way of disproving plaintiff's right to possession, or of an affirmative character, as ownership, either general or special. The unlawful detention of the property and plaintiff's right to its possession are put in issue by the general denial. The right of defendant to hold the property by virtue of legal process could in no sense be inconsistent with the defense pleaded by the denial. *Richardson v. Steele*, 9 Neb., 483.

It is insisted that the court erred in overruling plaintiff's motion for judgment on the special findings of the jury. Plaintiff asked, and the court submitted, certain interrogatories to the jury to be answered specially. These interrogatories, with the finding of the jury thereon, are as follows:

"*First.* Did the plaintiff Williams, at the time the property in question was taken by the defendant, have a special ownership in any of said property? Yes.

"*Second.* Did the plaintiff own any of the property in question when it was taken by defendant? Yes.

"*Third.* Was the plaintiff in possession of the property in question when it was taken by defendant? Yes, as the agent of Lawrence Holland.

"*Fourth.* Was the plaintiff entitled to the possession of the property in question when this action was commenced? No."

Merriam v. Miller.

The most that can be said by plaintiff upon a motion for judgment in his favor is, that these findings are contradictory. If plaintiff was not entitled to the possession of the property when he commenced his action—and so the jury found—he could not recover. It is true the jury said he had a special ownership in a *part* of the property, and that he owned a *part*; yet, if he was not entitled to the possession he could not recover a judgment therefor.

As we read the testimony, plaintiff's claim was, that he was a joint owner with Lawrence Holland in the lumber yard, and that he had a lien upon Holland's interest for certain money paid out for Holland. But this idea is not embodied in the interrogatories submitted to the jury. If plaintiff had a special ownership in *part* of the property, he might not be entitled to the possession of *all*. The same might be true if he was the absolute owner of a *part*. The court did not err in this ruling.

For the reason that the verdict of the jury is not sustained by sufficient evidence the judgment of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

52	218
41	199
22	218
56	215
22	218
61	95

LYDIA A. MERRIAM, ADMINISTRATRIX, ETC., PLAINTIFF
IN ERROR, V. RICHARD H. MILLER AND OTHERS,
DEFENDANTS IN ERROR.

1. **Limitation of Actions.** When it appears on the face of the petition that the cause of action arose at such a period that, under the statute of limitations, no action can be maintained thereon, the defendant may demur to the petition on the ground that the facts stated therein are not sufficient to constitute a cause of action. *Peters v. Dunnells*, 5 Neb., 460.

2. ———: COUNTY TREASURER'S BOND. An action on the bond of a county treasurer is barred by the statute of limitations after the lapse of ten years from the time the cause of action accrued.

ERROR to the district court for Otoe county. Tried below before HAYWARD, J.

Charles W. Seymour, for plaintiff in error.

John C. Watson, for defendant in error.

COBB, J.

The petition in the court below contained five causes of action. The plaintiff is the executrix and sole heir at law of Selden N. Merriam, deceased. The defendant, Richard H. Miller, is an ex-county treasurer of Otoe county; Nemiah S. Harding, Samuel Tate, L. F. Cornutt, Leopold Levi, Vincent Straub, Albert Tuxbery, and William Bischof were securities on his official bond. Vincent Straub has deceased, and David Straub is sued as his administrator.

The petition alleges that on the 17th day of June, 1874, L. F. D'Gette (who afterwards sold and delivered the tax certificate to said S. N. Merriam) purchased of the defendant, Richard H. Miller, as county treasurer of Otoe county, at private tax sale, the south-east quarter of section 31 in township 9 of range 13, for the delinquent taxes of the years 1861 and 1862.

On the 16th day of June, 1876, C. H. Van Wyck commenced an action in equity in the district court of Otoe county against Selden N. Merriam and others, the cause of such action being that he, the said C. H. Van Wyck, was and had been the owner and in the possession of the lands set out in the first cause of action described in the petition in the case at bar during the years 1861, 1863, and 1875; that the same was taxed to him and in his name; that the

sale thereof for said taxes by the county treasurer was void for the reason that at the time said taxes for the year 1875 were due, and at all times thereafter up to the date of said sale, the said C. H. Van Wyck had owned in his own name in Nebraska City, Otoe county, an abundance of personal property sufficient to pay the said taxes for the said year, and out of which the said taxes could have been made by distress and sale by the said treasurer, but that said treasurer made no attempt to collect the said taxes for the year 1875 by the distress and sale of said property of said C. H. Van Wyck, but sold the said property to the assignor of said Merriam without first attempting to make said taxes out of the said personal property of said C. H. Van Wyck.

The said lands were sold to Merriam's assignor for the taxes of 1861 and 1862, on the 17th day of June, 1874, and it appears from the petition in the case at bar that the lands were not sold at all for the taxes of the year 1875, but that "on the 11th day of January, 1876, S. N. Merriam paid to said county treasurer of said county the tax due the county and state of Nebraska on said property for the year 1875, amounting to the sum of \$95.96." Said payment was made by Merriam under the provisions of the statute (Comp. Stat., Ch. 77, Sec. 116), he being the holder of the certificates for the taxes of the years 1861 and 1862. There is also an allegation under this head, "that the assessors for Nebraska City precinct, in said county of Otoe, did not make a return to the county clerk of said county at the time and in the manner required by law of the taxable property in said precinct for the years 1861, 1862, and 1875, and did not take and subscribe the oath required by law to be taken by assessors, and attach the same to their assessment rolls; that said real estate was not advertised for sale by the county treasurer." There was a final decree entered in said court at the December term, 1876, canceling all of said taxes, etc.

The second cause of action alleges the sale by the said county treasurer of a certain quarter section of land therein described, for the delinquent taxes of the year 1872, to one J. P. Mathias. Said sale took place on the 17th day of September, 1875, and said Mathias afterwards assigned the certificate of sale to plaintiff's testator, but before doing so he paid to said treasurer, under the provisions of statute hereinbefore referred to, the taxes on said land for the years 1873 and 1875; that on the 13th day of February, 1876, the Sullivan Savings Institution commenced an action in the said court against said J. P. Mathias and others for the purpose of setting aside and cancelling the certificate of said sale and of enjoining the treasurer of said county from executing a tax deed thereon to S. N. Merriam, assignee of said Mathias, on the ground that the said Sullivan Savings Institution was the owner of said land for all of said years and during all of said time had and owned in its own name in said county of Otoe sufficient personal property-out of which said taxes could have been made by distress and sale, etc. Also that the assessors of the precinct where said land was situated did not make and subscribe and attach to their assessment rolls for the year 1875 the oath required by law; that the said land was not advertised for sale for the non-payment of taxes for the year 1872 at the time and in the manner required by law, etc., and that the said treasurer did not make a return to the county clerk of the real estate sold in the year 1872, etc.; that at the March term of said court for the year 1877 a decree was rendered in said cause canceling said certificates and enjoining the making of a deed thereon.

For a third cause of action: That on the 17th day of September, 1875, the said county treasurer sold to said J. P. Mathias at private tax sale, for the delinquent taxes of the years 1871, 1872, 1874, 1875 (?), and 1876 (?), and issued to him a certificate therefor, which certificate the said Mathias assigned to the said S. N. Merriam; that on the

8th day of September, 1877, one Phebe Howard commenced an action in said court against the said S. N. Merriam and others for the purpose of canceling said certificates and enjoining the then treasurer of said county from executing a tax deed thereon. The grounds of illegality of said sale were the same as those set up in the preceding causes of action, with the addition of the following: "That the county clerk of Otoe county for the year 1871 did not prepare a duplicate tax list of the property of said county for said year and deliver the same to the county treasurer at the time required by law, and that the said treasurer of said city, nor did the tax collector for the said city, on or before the 15th day of July, 1871, 1872, 1873, 1874, 1875 (?), and 1876 (?), prepare a delinquent tax list of the delinquent taxes in said city for the said years, or transmit the same to the county treasurer of said Otoe county on or before the 15th day of July, 1871, 1872, 1873, 1875, and 1876." The same final decree was rendered as those set out in the other causes of action.

The fourth cause of action alleges that on the 14th day of July, 1874, the said county treasurer sold at public tax sale for the delinquent taxes of the year 1860, to one L. F. D'Gette, a certain tract of land therein described, and issued to him a certificate of sale therefor; that said D'Gette then paid the treasurer the delinquent taxes on said land for the years 1861 and 1869, amounting to the sum of \$95.54; that on the 11th day of January, 1876, the said S. N. Merriam, assignee of said D'Gette, paid to said county treasurer \$24.98, the delinquent taxes for the year 1875; that on the 21st day of June, 1876, one Amsdell Sheldon commenced an action in said court against said S. N. Merriam and others, the object of which was to cancel the said sale and certificate, and enjoin the treasurer of said county from executing a tax deed thereon. The grounds of illegality set out are substantially the same as in the other causes of action except the third. On the 17th

day of December, 1877, a decree was rendered in said cause in all respects the same as in the other cases.

The fifth cause of action I copy at length, from the petition.

“ Fifth cause of action :

“ And this plaintiff further alleges that on the 31st day of July, A.D. 1882, that the S. N. Merriam, during his lifetime commenced an action in this court in equity, wherein the said S. N. Merriam was plaintiff, and John Dill, John A. Dill, and the Chicago Lumber Company, were the defendants, the object of the said action was to recover the delinquent taxes then there due, and payable to the said S. N. Merriam, paid by him on the following described real estate, to-wit :

“ Lots 4, 5, 6, block 75, Nebraska City, Otoe county, Nebraska, for the years 1874, 1875, 1876, 1878. That on the 19th day of April, 1883, being one of the days of the April term of this court, a trial of said action was had, wherein the said Selden N. Merriam was plaintiff, and John A. Dill and John Dill, and the Chicago Lumber Company, were defendants, and a decree was rendered therein against this plaintiff, setting aside the special cash, 2 mills, val. 4,100, \$8.20, 1875, and interest 12 per cent, 6 yrs., 11 mo., 17 da., \$15.39. Special road tax, \$10.20 1875 ; spec. cash, 2 mills val. \$3,000, \$900, 1876 ; spec. bridge, \$9.00, 1876, and 12 per cent interest on 5 yrs., 11 mo., 17 da., \$12.90, \$8.20, \$10.20, \$18.40, declaring them void and setting aside and canceling said tax of 1875 and 1876, declaring them void and of no effect. 1874, special road tax, \$13.78, interest 12 per cent., 7 yrs., 11 mo., 17 da., \$11.00. 1878, special bridge, \$5.25, interest, 3 yrs., 11 mo., 17 da., \$2.43. Total amount, \$97.20 ; that by reason of the fact aforesaid, the plaintiff has been damaged in the sum of \$97.20, with interest thereon, from Sept. 8th, at 40 per cent per annum.”

There was a general demurrer to the petition, which was

sustained by the court, and the plaintiff declining to plead further, judgment was rendered for the defendants.

The cause is brought to this court on error by the plaintiff.

The errors assigned are :

1. For sustaining the demurrer to the petition.
2. For not overruling the demurrer ; and
3. For rendering judgment for the defendants.

As the contention of plaintiff in error seems to be directed in some degree to the form of the demurrer of defendants, I here set it out at length :

"The defendants, R. H. Miller, N. S. Harding, S. Tate, L. F. Cornutt, L. Levi, David Straub, and William Bischof, demur to the 1st, 2d, 3d, 4th, and 5th counts of the petition of the plaintiff, because the facts stated therein are not sufficient to constitute a cause of action against the defendants.

"J. C. WATSON,

" *Attorney for Defendants.*"

I do not think its form objectionable as a general demurrer.

In the case of *Peters v. Dunnells*, 5 Neb., 460, the court, in the opinion, say : "The principle is well settled under our code, that where it appears on the face of the petition that the cause of action arose at such a period that under the statute of limitations no action can be brought, the defendant may demur to the petition on the ground that it does not state facts sufficient to constitute a cause of action."

The writer of the above opinion, in his work on Pleading and Practice, says : "The codes of New York, North Carolina, South Carolina, and Wisconsin provide that the objection that the action was not commenced within the time limited can only be taken by answer. Bliss on Code Pl., § 355. In those states, therefore, a demurrer is not available to raise the question of the bar. But in the ab-

sence of a statute to the contrary, the rule is, that if it appears on the face of the pleading to which a demurrer is filed that the action is barred, a demurrer will lie upon the ground that the pleading fails to state cause of action. If the defendant fails to demur he may plead the statute in bar, and he must do so, unless he intends to waive the protection of the limitation." Citing: *Sturgis v. Burton*, 8 O. S., 215. *Huston v. Craighead*, 23 Id., 198. *Zane v. Zane*, 5 Kan., 134. See Maxwell's Pleading and Practice, 79.

We must hold, therefore, that a general demurrer, such as pleaded in the case at bar, and copied above, will raise and present the question, whether the cause of action set out in the pleading demurred to arose within the time before the commencement of the action limited by the statute applicable thereto.

This brings us to the consideration of the question, when did the several causes of action arise, as set out in the petition, and when did the statute of limitations commence to run thereon? We have seen that the sale of C. H. VanWyck's land by Miller, the principal defendant, in his official character as county treasurer, was on the 17th day of June, 1874. This sale constitutes the first cause of action. It is true that on the 11th day of January, 1876, the said S. N. Merriam, assignee of the certificate of such sale, paid subsequent taxes on said land, but such payment was merely subsidiary to the original purchase, and augmented his claim thereunder, but constituted no separate cause of action. The sale of the lands of the Sullivan Savings Institution took place on the 17th day of September, 1875. This sale constitutes the second cause of action. The sale of land of Phebe Howard took place on the 17th day of September, 1875, and as this sale is alleged to have been made for the taxes of the years 1871, 1872, 1873, 1874, 1875, and 1876, there is no allegation of the payment of either prior or subsequent taxes there-

under. The said sale constitutes the third cause of action.

The sale of the lands of Amsdell Sheldon took place on the 14th day of July, 1874. The purchaser, and assignor of plaintiff's testator, paid the prior taxes thereon for the years 1861 and 1869, and the subsequent taxes for the year 1875, but these payments, as we have seen, were merely ancillary to the original purchase, and give no new date to the cause of action founded thereon. Even if they did, these transactions all occurred more than ten years before the commencement of the action.

This sale constitutes the fourth cause of action.

This is an action on the official bond of a county treasurer. It was commenced on the 16th day of August, 1886. We have seen that each one of the 1st, 2d, 3d, and 4th causes of action arose more than ten years before that date.

It is deemed unnecessary to follow the discussion of counsel in the briefs as to the section or clause of the statute under the provisions of which this case falls. It is deemed sufficient to say that ten years is the longest period of time mentioned in our statute of limitations within which any action can be commenced after the cause of action accrues. And that, except in the specially excepted cases of the disability of the plaintiff to sue, and concealed frauds, all actions are barred after the lapse of ten years from the accruing of the cause of action. It necessarily follows that the demurrer was properly sustained as to the first four causes of action. Code, sec. 14.

I doubt that I understand what the pleader sought to set out as the *fifth* cause of action. It alleges the commencement of an action by the plaintiff's testator in his lifetime against John Dill, John A. Dill, and the Chicago Lumber Company for the purpose of recovering "the delinquent taxes then and there due and payable to the said S. N. Merriam, paid by him" on certain lots set out by number in the city of Nebraska City for the years 1874, 1875, 1876, and 1878. That a trial was had in said action

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in which a decree was rendered against the said S. N. Merriam, plaintiff, setting aside certain taxes therein specified by name and amount, and "that by reason thereof the plaintiff has been damaged in the sum of \$97.20, with interest thereon from Sept. 8th at 40 per cent per annum."

It is sufficient to say of this cause of action that it in no manner connects the defendants, or either of them, with either the lawsuit therein referred to or the sale of the lots for the taxes specified. The demurrer was, therefore, properly sustained as against said *fifth* cause of action.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

ART. ELIZA ALEXANDER, PLAINTIFF IN ERROR, V. JOHN OVERTON AND OTHERS, DEFENDANTS IN ERROR.

22	227
56	215
22	227
61	96

Limitation of Actions: COUNTY TREASURER'S BOND. An action on the official bond of a county treasurer against such county treasurer and his securities for selling to the plaintiff certain lands for delinquent taxes, which sale is alleged to be void for the want of legal proceedings by the said county treasurer and other taxing officers, as to the time within which the same may be commenced, comes within the provisions of section 14 of the code of civil procedure, and may be commenced at any time within ten years from the time the cause of action accrued.

ERROR to the district court for Otoe county. Tried below before HAYWARD, J.

Charles W. Seymour, for plaintiff in error.

John C. Watson, for defendant in error.

COBB, J.

The facts set out in the petition in this action, with the exception of names and dates, are identical with the first four causes of action set out in the petition in the case of *Lydia A. Merriam v. Richard H. Miller and others*, disposed of at the present term. As in that case, there was a general demurrer to the petition, which was sustained and judgment for the defendants, and the cause is brought to this court on error by the plaintiff.

The only question argued by counsel in the briefs, as raised by the demurrer, is that of the statute of limitations.

The petition was filed in the office of the clerk of the district court on the 5th day of August, 1886. There is not shown to have been any summons served or issued in the case, but as the defendants appeared in the action and filed a general demurrer to the petition on the 24th day of August, 1886, that will be held to be the date of the commencement of the action. The sales of the several parcels of land by the principal defendant, to the plaintiff, for delinquent taxes are alleged in the several causes of action, as set out in the petition, to have taken place on the 8th day of September, 1876; less than ten years before the commencement of the action as above stated.

Section 14 of the code of civil procedure provides that "An action upon the official bond or undertaking of an executor, administrator, guardian, sheriff, or any other officer, or upon the bond or undertaking given in attachment, injunction, or in any case whatever required by statute, can be brought within ten years."

This is an action on the bond of a county treasurer. Although county treasurers are not specifically named in the above section, they clearly fall within the general designation "any other officer," and actions upon their bonds are thus brought within the provisions of the section.

Counsel for plaintiff in error relies upon section 11 of

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the code, which provides, in effect, that, "Actions upon a contract, not in writing, expressed or implied; an action upon a liability created by statute other than a forfeiture or penalty" can only be brought within four years.

There doubtless is an apparent conflict between the provisions of the above two sections. But it will be readily seen that the provisions of section 11 are far more general and less specific than those of section 14, which quality would go far to indicate the latter as expressing the will of the legislature as to the points of apparent conflict. This, I think, would be true as to any statute, but more especially so in construing a statute of limitations, where the general clause would tend to limit and shorten the time clearly given by the more specific one.

In the case of *King v. Nichols*, 16 O. S., 80, cited by counsel for plaintiff, the supreme court of Ohio, construing section 17 of their code, which is substantially the same as section 14 of ours, say: "The language of the 17th section of the code expressly limiting actions on official bonds to ten years, leaves no room to doubt that the legislature intended such actions should be subject to that limitation and no other, for to hold that they are constructively limited to a different period would annul that section, and give it no effect whatever."

I conclude, therefore, that neither of the causes of action set out in the petition were barred by the statute of limitations at the date of the commencement of the action, and as no other ground of demurrer is contended for in the brief of counsel, that the demurrer should have been overruled.

The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

23	230
24	769

THOMAS WORTHINGTON, PLAINTIFF IN ERROR, V.
THOMAS WOODS, DEFENDANT IN ERROR.

Forcible Entry and Detention. Where the testimony shows that a party is in possession of real estate under a contract of purchase, an action of forcible entry and detainer will not lie to oust him from such possession. *Dawson v. Dawson*, 17 Neb., 671. *C. B. & Q. R. R. v. Skupa*, 16 Id., 341. *Streeter v. Rolph*, 13 Id., 390. *Pettit v. Black*, 13 Id., 154.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

B. F. Johnson, *A. W. Field*, and *L. C. Burr*, for plaintiff in error.

R. D. Stearns and *Jesse B. Strode*, for defendant in error.

MAXWELL, CH. J.

The defendant in error brought an action of forcible entry and detainer against the plaintiff in error to recover the possession of lot 7 in block 1 in Spencer's addition to Lincoln, and on the trial recovered a judgment of restitution. It appears from the testimony that one C. E. Worthington, a son of the plaintiff in error, entered into the following contract with one James E. Spencer:

"Know all men by these presents: That C. E. Worthington is held and firmly bound unto James E. Spencer in the penal sum of \$1,200 dollars, for the payment of which I bind myself firmly by these presents, upon condition as follows: Whereas Jas. E. Spencer has agreed to sell and convey unto the said C. E. Worthington for the consideration of twelve hundred dollars, the following described premises, to-wit: Lot number seven (7) in block one (1) in Spencer's addition to Lincoln, according to the

Worthington v. Woods.

recorded plat thereof, subject to a certain mortgage and notes of 200 dollars payable on or before 2 years from May 27th, 1886. And C. E. Worthington has agreed to purchase said premises, and to make payment as follows: Thirty-two promissory notes of twenty-five dollars each, and payable on the first of every month until all are paid, with the rate of interest of ten per cent per annum from date until paid.

"Therefore the condition of this obligation is such that if the above bounden Jas. E. Spencer will convey said premises by deed of general warranty, and clear of all incumbrances, unto said C. E. Worthington, upon payment of said considerations at the times above specified, then this obligation to be void; otherwise to remain in full force and effect. Witness our signatures hereto subscribed this 31st day of May, A.D. 1886.

"JAS. E. SPENCER,

"C. E. WORTHINGTON.

"Witness:

"WILLIE MEYER.

"THE STATE OF NEBRASKA, } ss.
LANCASTER COUNTY.

"Be it known that on the 31st day of May, 1886, before, the undersigned, Willie Meyer, a notary public in and for said county, personally came Jas. E. Spencer and C. E. Worthington, to me known to be the identical persons described in and executed the foregoing bond as obligors, and acknowledged the said instrument to be their voluntary act and deed.

"Witness my hand and notarial seal the day and year last above written.

"[SEAL.]

WILLIE MEYER,

"Notary Public."

The plaintiff alleges that the above contract was made for his benefit, his son Charles making a payment thereon of \$200. The plaintiff testifies: "We rented a home

on O street, opposite Mrs. Riordan. Charles came in one day and says: Pa, you can save paying rent by buying that property on O street where Jim Spencer has just moved an old blacksmith shop. I asked what he would sell it for. He told me; I said, how can we pay for it? He said, come out and see him. We went out and saw him in his barn, and the thing was talked right over in the barn between me and Jim Spencer, and my boy. Jim says, Charley, buy it for the old man and he can pay for it, and he can have a good home; he said, how much could you pay? And looked at my boy and kind of laughed. He said: I can pay you \$200 down. He says: Well, I will take it, and \$25 a month. The house was in such a condition you could not keep a hog in it, even if it was fenced up. There was no doors on the back part nor windows."

Q. What about the \$25?

A. The \$25 I was to pay monthly—that was to pay for the property till it was paid for on that contract; but there was a verbal contract between me and my son. It was right before Spencer—Spencer was a witness to it—Spencer was the only witness to it. I never said no one else. He brought a little note into me; I took my specs out to look at it, and says: "Mr. Spencer I won't pay that; I am not going to pay rent, and before I will pay I will go back to Iowa, where I hadn't no rent to pay." He says: "Very well, Col.," and just scratched it off; I says, "All right." He had taken the money and was counting it—I was taking the money back, but he took it up, and arranged it that way. He never mentioned it to me, only what he said about Charley—never.

Q. What was the condition of the house when you took possession?

A. You could not keep a hog in it without it was fenced all around the house, nor without taking up the floor, which had tumbled all in; nor hadn't no light—you

know what a blacksmith shop is. We had to take the upper floor off. There was such a stench of filth we had to take it out, and a person who came in there would know this himself. We patched it and put another floor on, and put it in two rooms. The house was in that condition you could not lead a horse in only in certain corners of the house, because it was getting all worn through where it had been a blacksmith shop, and not fit for no human being to live in.

Q. Who paid for fixing it up?

A. I paid all of it. Charlie paid for the lumber put into that; he told me to get the lumber there on 10th street—he was acquainted and I was not. He says: "Pa, go and get the lumber, and tell them to charge me." I took Henry with me, and we got it and hauled it up. He is a pretty good carpenter, and did that kitchen part. I paid for the labor and all the lumber of that eighteen or sixteen foot.

Q. Just the addition?

A. Just the whole building of the addition on the back room there—there is an addition put to it.

Q. Who paid for the lathing and plastering?

A. I paid all that inside work—all there is inside.

Q. Who built and paid for the ice house?

A. I built it and paid for it. I paid for that, I think, between the 23d of December—that is, all but what is still owing.

Q. When did you go into possession there?

A. I was in possession, I guess, on the first start, you see, when I moved into it. I moved in about the 1st of July.

Q. How did you come to pay \$30 a month?

A. Thirty dollars a month, and \$5 was to pay extra to keep the interest down. Twenty-five dollars was the agreement, and I defy either my boy Charles, or anybody else, to say it ain't so, because it is so, for it is facts, and

facts is stubborn. Jim Spencer says to me: "Worthington, don't blame me a particle, don't blame me."

Q. What did Spencer say at the time he scratched off that rent receipt?

A. He said: "All right Col.; all right Col.," and scratched it off as he spoke.

In this testimony the plaintiff is substantially corroborated by two of his sons.

The plaintiff made two payments of \$30 each, the first being made about the first day of July, 1886, and the second in August, 1886, and received receipts therefor, both signed by Spencer. The words, for rent, which had been inserted by Spencer in the receipts, were stricken out, as the plaintiff insisted he was not paying *rent*. Some time in August, in the year 1886, Charles, the plaintiff's son, made some arrangements with Spencer by reason of which he surrendered the contract or bond heretofore set out, and seems to have done what he could to oust his father from the possession of the premises. The father, however, claimed to be the owner, and seems to have tendered the monthly payments upon the aforesaid contract. There is a large amount of testimony denying the title or interest of the plaintiff to the property in question. The plaintiff, however, retained possession, and claimed to be owner of the premises. In the autumn of 1886, Spencer sold the property in controversy to the defendant, Woods, who purchased with full notice of whatever title or interest the plaintiff may have in the premises. It will thus be seen that the action comes directly within the rule laid down in *C., B. & Q. R. R. v. Skupa*, 16 Neb., 341. *Streeter v. Rolph*, 13 Id., 399. *Pettit v. Black*, 13 Id., 154. *Dawson v. Dawson*, 17 Id., 671. In the latter case it is said: "Whether the contract under which the defendants hold possession is valid or not, cannot be determined by the county court or a justice of the peace, but is a proper question for a court of equity, which has power to protect

Flanigan v. Continental Ins. Co.

the rights of the parties, and enforce its decrees, when an action is brought to enforce or annul the alleged contract."

This, in our view, is a correct statement of the law, and as it is evident that the plaintiff has an interest in the property in controversy, which can only be protected and enforced in a court of equity, an action of forcible entry and detainer will not lie.

The judgment of the district court is therefore reversed, and the action dismissed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

22	235
48	834

JOHN FLANAGAN, PLAINTIFF IN ERROR, V. CONTINENTAL INSURANCE CO., DEFENDANT IN ERROR.

Justice of Peace: JUDGMENT BY CONFESSION. Where a defendant appears without process before a justice of the peace and confesses judgment in favor of a creditor, the assent of such creditor is necessary to give such justice jurisdiction, but where a creditor has brought an action against a debtor to recover a specified sum of money upon a certain claim, and caused a summons to be issued and served, and the debtor appears before the justice and confesses judgment for the amount claimed and costs, the assent of the plaintiff will be presumed, and to entitle him to have the judgment set aside, he must make it appear to the justice that he has been prejudiced by such confession.

ERROR to the district court for Douglas county. Tried below before WAKELEY, J.

David Van Etten, for plaintiff in error.

Breckenridge & Breckenridge, for defendant in error.

MAXWELL, CH. J.

On June 11, 1885, the Continental Insurance Company began an action before a justice of the peace against Julia Flanagan and John Flanagan to recover the sum of \$16.00 due on a promissory note. Summons was issued returnable June 19, 1885, at one o'clock P.M., and delivered to a constable, who, on June 15, 1885, returned the same served. On June 19, 1885, the parties appeared, and by consent the case was continued until July 11, 1885, at one o'clock P.M.

June 27, 1885, John Flanagan appeared and confessed judgment for the sum of \$19.22, and on June 29, 1885, Julia Flanagan appeared and confessed judgment for the sum of \$19.22, and thereupon the justice rendered judgment for the plaintiff in the sum of \$19.22, and costs of suit, taxed at \$4.75.

On July 11, 1885, the plaintiff filed a motion to set aside this judgment for the reason that it was rendered on confession without the consent of plaintiff, which motion was overruled, to which plaintiff duly excepted. The case thereupon was taken on error to the district court, where the judgment of the justice was reversed. The defendants below now prosecute a petition in error in this court.

Section 433 of the code provides that, "Any person indebted, or against whom a cause of action exists, may personally appear, in a court of competent jurisdiction, and, with the assent of the creditor, or person having such cause of action, confess judgment therefor, whereupon judgment shall be entered accordingly."

This court, in construing the above section in *Mercer v. James*, 6 Neb., 406, held that a justice of the peace, with the assent of the plaintiff, may render judgment on the personal confession of the defendant made orally in open court. That is, that a debtor, with the assent of the cred-

itor, may waive the issuing and service of summons and appear before a justice of the peace and confess judgment in favor of the creditor. To bind the creditor, his assent, either express or implied, must be obtained, as otherwise the judgment confessed might be greatly below the actual amount of the debt. Where, however, a creditor brings an action against his debtor upon a specified cause of action, and the debtor, to save expense, or for other cause, confesses judgment for the amount claimed, the assent of the creditor will be presumed. The creditor in effect makes demand for judgment for a certain sum and costs, and the debtor confesses that the creditor is entitled to judgment for the sum demanded. If a mistake has been made in the amount of the claim, or in any other respect, it must be brought to the attention of the trial court by a motion sustained by evidence, otherwise the error will be waived. In the case under consideration the judgment confessed by the defendants below was for the full amount claimed by the plaintiff. In what manner it is prejudiced by such confession was not made to appear to the justice, and is not apparent to this court; at the most it was error without prejudice. It is not the policy of the law to encourage continuous litigation of trifling matters of this sort, but to bring the same to a speedy and, if possible, inexpensive determination.

There being no prejudicial error in the ruling of the justice, the judgment of the district court is reversed and the judgment of the justice reinstated.

JUDGMENT ACCORDINGLY.

THE other judges concur.

22 238
22 248

JACOB S. ATWOOD, PLAINTIFF IN ERROR, V. JOHN
PEREGOY ET AL., DEFENDANTS IN ERROR.

Partnership: JUDGMENT: EVIDENCE. Where an action was brought against certain persons as partners for goods alleged to have been sold and delivered to the firm, and a preponderance of the testimony tends to show the existence of such partnership and the liability of the firm for the goods so purchased, a judgment of the district court against said alleged partners for such goods will not be set aside as being against the weight of evidence.

ERROR to the district court for Lancaster county.
Tried below before HAYWARD, J.

J. E. Philpott, for plaintiff in error.

Cornish & Tibbets, for defendants in error.

MAXWELL, CH. J.

On the 10th day of June, 1885, defendants in error [plaintiffs below] filed their amended petition in the court below, stating that they are and were partners, doing business under the firm name and style of Peregoy & Moore.

That Jacob S. Atwood and Frank E. Sarsbaugh were at all times named in the petition, and including the time of the commencement of this action, partners, doing business in Lincoln by the firm name and style of Atwood & Sarsbaugh.

That plaintiffs, in the regular course of trade, sold and delivered to defendants, at defendants' request, goods and merchandise as follows, to-wit:

May 29, 1883, cigars	\$29 40
June 27, 1883, "	35 40
July 14, 1883, "	59 00
Sept. 14, 1883, "	47 00

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That the goods so sold and delivered amounted to \$171.70, and defendants agreed to pay said amount. Said sum is due and payable from defendants to plaintiffs. Said sum has not been paid nor any part thereof. There is due from defendants to plaintiffs on said account \$171.70.

The answer of Atwood was a general denial.

On the trial of the cause judgment was rendered in favor of the plaintiffs below and against the defendants in the sum of \$194.65.

Plaintiff in error, one of the defendants below, thereupon filed a motion for a new trial, alleging:

- 1st. The court erred in finding for the plaintiffs.
- 2d. The court erred in finding that the said Sarsbaugh and said Jacob S. Atwood were partners.
- 3d. The said findings are contrary to law.
- 4th. The findings of the court are not sustained by the evidence.

This motion was overruled, to which plaintiff in error excepted.

The only error relied upon in this court is, that the judgment is not sustained by the evidence.

On the trial of the cause Frank E. Sarsbaugh, one of the defendants below, testified: "I am 30 years of age, reside in Hastings, and at present am tending bar. Jacob S. Atwood and myself are the parties defendant to this suit. I was engaged with Mr. Atwood in a billiard hall in the Arlington hotel, at Lincoln, on and after May 1st, 1883, till first of March, 1884, under the name of Atwood & Sarsbaugh. We had a contract in writing; here it is:

" 'LINCOLN, NEB., May 1st, 1883.

" 'Agreement between F. E. Sarsbaugh and J. S. Atwood, in which Sarsbaugh agrees to take charge of, and manage to the best of his ability, the Arlington Billiard Hall, devoting his time thereto, paying all the expenses incident to running the same, including gas, fuel, license on billiard tables, and such additional help as will be necessary to

properly run the same, and to pay Atwood one hundred and twenty-five dollars per month, and payable monthly as rent for use of rooms, tables, and other fixtures, etc.; to keep the fixtures and tables in good order, so as to return the same in as good condition as received, except the natural wear of use. Atwood to furnish six tables and fixtures now in use, except one pool table, which is ordered from Chicago, and expected next week, and in consideration of such undertaking Atwood agrees that in case the net receipts are not sufficient when equally divided, half and half, alike to Sarsbaugh and Atwood, to make Sarsbaugh \$58.33 per month; then Atwood agrees to pay Sarsbaugh the difference so as to make it equal to the rate of \$700 per annum for such time as this agreement exists or Sarsbaugh continues to run the same as above.

“J. S. ATWOOD,

“F. E. SARSHAUGH.”

Q. Under what name did you purchase goods and do all business?

A. Under the name of Atwood & Sarsbaugh; I knew of no other except Mr. Atwood who advertised under that name. He advertised in first week in May, 1883, in the *Lincoln State Journal* and the *Evening News*; I think Mr. Atwood put it in, because he brought the *Journal* over one morning, and showed it to me. I could not say who paid for it; I did not. Besides the billiard hall, the firm kept cigars. The cigar stand was run in connection with the billiard hall. Money for the games played, and for cigars, was the proceeds of the billiard hall, and it was paid out for expenses, etc. At the time of the contract of partnership the property of the firm was billiard tables, pool tables, a cigar case, cigars on hand, and other fixtures, chairs, etc; When I took these things they were in charge of Mr. Atwood, as far as I knew. I usually sent him (Atwood) monthly statements of the receipts and expenses taken in from the tables and cigars, and expenses of gas and fuel.

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I reckoned cigar bills as firm expenses. I don't know of any knowledge particularly Mr. Atwood had of that, except that it was all run as one business, and proceeds all went into one box; I don't know how he knew it all went into one box. There was about \$171.70 of goods purchased of Peregoy & Moore. I purchased the goods in the firm name, of course.

Q. What statement, if any, did you ever make to Mr. Atwood regarding cigar bills and other expenses?

A. I wrote a letter to him once, asking him to give me some money, that I was in debt, and needed some money to pay off some bills; that money was desired to pay off this cigar bill; don't know whether I mentioned it that way in the letter or not; I don't remember any more I asked for. Atwood replied in writing; I don't know where the writing is, and haven't it. As near as I can remember, Atwood said something like this: If it was a necessary bill he would try and give me the money when he came up. This is near as I can remember.

A letter from Sarsbaugh to Atwood is set out in the record, which has no bearing upon the case.

W. E. Brock testified: "Council Bluffs is my headquarters. Have traveled for Peregoy & Moore five years; am the salesman that sold that bill of goods to the Arlington Billiard Hall, some time after May 1, 1883. I sold to a gentleman named Sarsbaugh. Atwood & Sarsbaugh was the firm name he always gave me. When I sold I gave credit principally and particularly to Mr. Atwood. I would not have sold to Mr. Sarsbaugh. I never suspected that Mr. Atwood was not a partner. I sold him in the neighborhood of \$200, but I could not state the exact amount. The bill was not paid when due; has never been paid to my knowledge. Whenever I would present the bill to Sarsbaugh he would put me over to Mr. Atwood. He would tell me that Atwood would pay the bill; that he sent all the money to Mr. Atwood the first of every

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month. I presented the bill to Mr. Atwood. I don't know the exact date ; some time after it was due ; it was at the Arlington Billiard Hall ; I met Mr. Atwood there. I spoke to Mr. Atwood, and told him it was getting old, and it would look better if it was settled up. I showed it to him in my pocket ledger. He said he had already received a statement of the account from the firm, and that I could write that he would fix that as soon as he returned to Springfield ; he would remit at least one-half. I have an idea, but I am not sure of this, that he said a hundred dollars of the account, and the rest he would pay before long, but his idea in running the billiard hall was not to put any more into the billiard hall than he had, and he would like to have it pay it up itself, but that it was getting old, and he would square it up himself."

The following letters were then introduced :

"LINCOLN, NEB., Sept. 21st, '83.

"*Messrs. Peregoy & Moore, Council Bluffs, Ia.*:

"DEAR SIRs—I will drop you a line in regard to cigar bill, which is past due, and will say Mr. Atwood is east, in New York, and will not be back before about 1st October, when will pay you up prompt on his return.

"Hoping that is satisfactory,

"Very truly yours,

"F. E. SARSBAUGH,

"*Manager Billiard Hall.*"

"LINCOLN, NEB., June 26.

"*Peregoy & Moore, Council Bluffs:*

"DEAR SIR—You may send me 300 Cubana cigars and 300 J. W. P. cigars. Would like to have some.

"Yours truly,

"ATWOOD & SARSBAUGH,

"*Arlington Billiard Hall, Lincoln, Neb.*"

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"LINCOLN, NEB., Nov. 5th, '83.

"*Messrs. Peregoy & Moore:*

"DEAR SIRS—Your statement received. Am sorry to see I have not yet remitted, but say that Mr. Atwood is back east and was expected here sometime ere this, but for some reason had been delayed. He will be here about 12th this month, and soon as he returns will send you a check for full amount. Hoping you will pardon the delay so far, and will add that I do not look for the last order until is paid what has been received.

"Yours respectfully,

"A. & SARSHAUGH."

Brock further testified: "I don't know what constituted the Arlington Billiard Hall on 1st day of May, 1883, on that identical day."

Q. Did you sell cigars to Jacob S. Atwood?

A. No, sir.

Q. Had you sold cigars to the Arlington Billiard Hall prior to May 1st, 1883?

A. Yes, sir; and up to May 1st, 1883, I think. I sold to John S. Atwood, the proprietor. The billiard hall up to that time kept cigars and sold them.

Cross-examined he testified:

Q. You say you shipped goods to John S. Atwood, of the Arlington Billiard Hall?

A. Yes, sir.

Q. Is he Jacob S. Atwood?

A. I don't think he is. I first made the acquaintance of Sarsbaugh somewhere in the year 1883, at the Arlington Billiard Hall, Lincoln, Neb. I saw Jacob S. Atwood there at that time; had no conversation with him. On that occasion I asked Sarsbaugh who was going to run it, and how. He said that the old gentleman had taken John's interest, and had put him in there, and they were going to run it on the shares. I asked him if he wanted to buy some goods, and he said yes. We had sold them be-

fore, and he wanted to keep the same cigars. I gave credit principally to Mr. Atwood.

Q. Why didn't you give it to the firm?

A. He was the only one in that firm that I knew had a commercial standing.

Q. How did you know he had a commercial standing?

A. Just from hearsay.

Q. Did you ever examine?

A. I never did.

Q. You don't know whether he had any standing or not?

A. I don't know. * * * I did not go out and inquire of anybody as to the credit of Mr. Atwood. I do not extend credit myself. I take orders, and the house places them if satisfactory; if not, they refuse them. I never talked with Jacob S. Atwood about the sale of these cigars to him, or to the firm, before the sale.

Q. When was it you first talked with him about this sale; after they had long been past due?

A. Yes.

Q. And Sarsbaugh hadn't paid?

A. No. He just turned me over to Mr. Atwood.

Q. Did you ever talk to Mr. Atwood about this matter until Sarsbaugh refused to pay?

A. No.

Q. When were the times you met him at the hotel?

A. After the bill was sold and due.

Q. After you first saw him did you first speak to him about this bill the first time?

A. Yes.

Q. And the next time you saw him did you speak to him about this bill?

A. I don't know as I did.

Q. Where did you see Mr. Atwood that you first spoke to him about the cigar bill?

A. At the Arlington Billiard Hall.

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Q. When did that occur?

A. At the Arlington Billiard Hall.

Q. What time was it?

A. The fall of the year. I said to him the bill was becoming old, and it would look better if it was settled up. I presented it to him, and he looked at it, and said I could tell my firm when he went to Springfield, Missouri, he would send part of the money, and the rest before long.

Q. Did he make that promise to you in writing or verbally?

A. Just verbally.

The testimony of Jacob S. Atwood was taken by deposition, in which he denies the existence of the partnership between him and Sarsbaugh, and denies all liability for the goods in question. It will thus be seen that there is a direct conflict in the testimony as to the existence of the the partnership of Atwood & Sarsbaugh, although a preponderance of such testimony tends to show the existence of such partnership. It is unnecessary, therefore, to consider the question of a partnership as to third persons, as the written contract set out, with the acts of the parties done under it, as shown by a preponderance of the testimony, clearly establishes a partnership not only as to third persons, but as between the parties.

The judgment of the district court, therefore, is right, and is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JACOB S. ATWOOD, PLAINTIFF IN ERROR, V. KENNARD,
MOTTER & CO., DEFENDANTS IN ERROR.

Question decided is same as in preceding case.

ERROR to the district court for Lancaster county.

Same counsel as in preceding case.

MAXWELL, CH. J.

The defendants in error, plaintiffs below, filed their petition in the court below, alleging:

"The plaintiffs complain of defendants, and for cause of action state that plaintiffs are an association of persons doing business as partners in the city of Omaha, state of Nebraska, under the firm name and style of Kennard, Motter & Co., and are not incorporated; that the defendants, Jacob S. Atwood and Frank E. Sarsbaugh, were at all times hereinafter mentioned associated as partners and doing business in Lincoln, Nebraska, under the partnership name of Atwood & Sarsbaugh, not incorporated.

"Plaintiffs further complain and say, that on the 8th day of October, 1883, the plaintiffs, at defendants' request, sold and delivered to defendants certain goods and merchandise in the amount and value of \$46.50, which defendants agreed to pay; that on the 20th day of November, 1883, the plaintiffs, at defendants' request, sold and delivered to defendants further goods and merchandise in the value of \$50.00, which amount defendants agreed to pay.

"That no part of said amounts have been paid, and there is now due and payable from defendants to plaintiffs, on the causes of action above set forth, the sum of \$96.50 and interest thereon from the 20th day of January, 1884, at the rate of seven per cent per annum."

In his answer, Jacob S. Atwood says:

1st. That at the commencement of this action said Jacob S. Atwood and said Frank E. Sarsbaugh were not partners doing business in Lincoln or elsewhere.

2d. That at the commencement of this action the said Atwood and Sarsbaugh had no place of doing business as said alleged partners in said state of Nebraska or elsewhere.

3d. That plaintiffs' said cause of action is founded on a joint liability against the said defendants, and neither the said alleged firm of Atwood & Sarsbaugh nor the said Frank E. Sarsbaugh have been served with summons in this suit, and neither the said firm of Atwood & Sarsbaugh nor the said Frank E. Sarsbaugh have been made or entered at any time an appearance in this action.

4th. That the court has no jurisdiction over the persons of the said firm of Atwood & Sarsbaugh, nor of or over the person of the said Frank E. Sarsbaugh, and has no jurisdiction of the said so-called firm of Atwood & Sarsbaugh.

5th. Denies each and every allegation in plaintiffs' said petition contained.

On the trial of the cause a judgment was rendered in favor of the plaintiffs below in the sum of \$110.00. The defendant Atwood, plaintiff in error, thereupon filed a motion for a new trial, which motion was overruled, to which he duly excepted.

The following stipulations were entered into by plaintiffs and defendant:

"It is hereby stipulated and agreed by and between the said plaintiffs and the said Jacob S. Atwood, defendant, that on the trial of the above entitled cause of action, the above named parties may use in evidence the depositions of F. E. Sarsbaugh and of Jacob S. Atwood, now on file in the said district court in the case of Peregoy & Moore against said Atwood & Sarsbaugh, subject to all objections for immateriality and irrelevancy."

Newman v. Edwards.

The questions before this court are substantially the same as were decided in *Jacob S. Atwood v. Perego & Moore*, and the case is to be decided upon substantially the same testimony as in that case.

There is no error apparent in the record thereof, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

THOMAS NEWMAN, PLAINTIFF AND APPELLANT, V.
MILTON EDWARDS, DEFENDANT AND APPELLEE.

Conveyance: DEED: MORTGAGE: CONSIDERATION. Where, in an action by a plaintiff to have a certain deed declared a mortgage to secure the sum of \$60 debt, and \$440 to be thereafter advanced, the defendant answered admitting the debt, but denying the agreement for future advances, and alleging that the deed was intended as a conveyance upon an adequate consideration consisting of board, lodging, and services rendered by the defendant to the plaintiff, in all of the value of \$700. *Held*, That the proof failed to establish such consideration, and the plaintiff was entitled to redeem.

APPEAL from the district court of Douglas county.
Heard below before WAKELEY, J.

O'Brien & O'Brien and *O. H. Ballou*, for appellant.

George F. Brown, for appellee.

MAXWELL, CH. J.

The plaintiff in his petition alleges that on the 27th day of September, 1857, and ever since said date to the present time he was and still is the owner in fee simple of

Newman v. Edwards.

the south half of the south-west quarter of section three, and the north half of the north-west quarter of section ten, township fourteen, range eleven east, containing 160 acres of land, in Douglas county, Nebraska, and that he is now and has ever since the said date to the present time been in the quiet and peaceable possession thereof; that on or about the sixth day of February, 1873, the said plaintiff was indebted to defendant in the sum of about sixty dollars, and also was indebted to divers and sundry other persons in sums of money amounting in the aggregate to about the sum of \$440; that said defendant, on or about said last mentioned date, agreed to loan to said plaintiff the said sum of \$440 for the purpose of paying the same to his creditors, which, together with the said \$60 then due defendant from plaintiff, would amount to the sum of \$500; that in order to secure the payment of the said sum of money the plaintiff agreed to give to the defendant security on the said described land; that in pursuance of said agreement and for the said purpose of securing the payment of the said sum of money, plaintiff, on the said 6th day of February, 1873, made and executed a deed of said described real estate to said defendant, which deed was duly recorded in the office of the county clerk of Douglas county, Nebraska, on the 10th day of December, 1873.

That although said deed was an absolute conveyance in terms on its face, yet nevertheless the same was made by the said plaintiff to the said defendant as a mortgage only, and was intended as a security in the nature of a mortgage, which mortgage deed was not to be delivered to said defendant until said defendant should pay over to said plaintiff the said sum of \$440 as he had agreed to loan him; that said defendant never paid over to said plaintiff the said sum of \$440, nor any part thereof, though often requested so to do, and wholly disregarded his agreement in that behalf; that afterwards, on or about the — day of

— 1875, the said plaintiff and said defendant had a settlement of all matters between them, and plaintiff gave other and ample security to defendant for his said indebtedness to him; that said security has been subjected to the payment of the said indebtedness, and that the said sum of \$60, money for which a note had been given, has long since been paid to defendant.

That shortly after the time of the said settlement last made as above, between plaintiff and defendant, said defendant obtained possession of the said mortgage deed without the knowledge or consent of this plaintiff, and without paying any consideration therefor; that said defendant though often requested to release and discharge the said mortgage deed by proper instruments of release or conveyance, yet defendant has hitherto and still does neglect and refuse so to do, and that said mortgage deed is a cloud upon the title of this plaintiff.

Wherefore plaintiff prays judgment against the said defendant that he, the said defendant, do cancel and discharge the said mortgage deed by proper instrument of conveyance, and that the said cloud upon plaintiff's title to said land be removed, and for such other and further relief as justice and equity may require.

The defendant in his answer alleges that it is true, and he admits that the said petitioner did, on or about the 6th day of February, 1873, execute and deliver to this defendant a deed of the lands described in plaintiff's petition, which was duly recorded in the record of deeds of Douglas county, Nebraska, at the time stated in said petition; that at the time of making said deed the plaintiff was largely indebted to this defendant in a sum much larger than sixty dollars mentioned in said petition, and plaintiff desiring to pay the same, did of his own free act and accord make and deliver to defendant the deed aforesaid for the purposes of paying said indebtedness, and said plaintiff well knew the same to be an absolute deed of said lands, and so intended and under-

stood by the parties thereto at the time of its execution; defendant denies that he ever agreed to loan to said plaintiff four hundred and forty dollars as stated in said petition, nor any other sum of money, and he denies that said deed was given as a mortgage to secure the repayment of any such loan and the sixty dollars aforesaid; denies that there was any design or intention that said deed should be regarded as security for an old debt and money to be loaned by this defendant to plaintiff, and defendant never heard of any such pretence or the loaning of \$440 as part of the consideration of said deed until he saw it in plaintiff's petition herein; admits that he did not pay over to plaintiff the sum of \$440 for the reason that he never agreed to do so, and was not requested by the plaintiff nor by any one for him to make any such payment; denies that he had at any time after the execution of said deed of Feb. 6th, 1873, a settlement with plaintiff of the indebtedness constituting the consideration of said deed, and took other security for said indebtedness as falsely stated in said petition; avers that he never had any such settlement with plaintiff, and he was never requested to have any, and defendant never promised to cancel or in any way annul said deed of Feb. 6th, 1873, and the plaintiff never called upon or requested defendant to enter satisfaction of said deed nor to execute any other instrument of writing releasing or annulling said deed of Feb. 6th, 1873, conveying said lands unconditionally and absolutely to defendant; denies that plaintiff has been the owner of said lands since 1857, and in peaceable possession of said lands from said last mentioned date up to the commencement of this action as falsely stated in plaintiff's petition; on the contrary defendant avers that immediately after the execution and delivery by the plaintiff of the deed of Feb. 6th, 1873, to defendant, this defendant took possession of said lands under said deed with the full knowledge and consent of plaintiff, and has been in the quiet and undisputed posses-

sion of said lands about twelve years immediately preceding the commencement of this action, and defendant submits that the plaintiff ought not further to have or maintain his action against this defendant.

Defendant denies each and every allegation in the said petition contained not hereinbefore admitted or denied, and having fully answered prays hence to be discharged with his costs.

The reply is a general denial.

On the trial of the cause the court found for the defendant, and dismissed the action.

The points of decision as stated in the record are as follows:

"1. The theory and grounds of plaintiff's action are, that the deed in question was never delivered to the defendant, but was surreptitiously taken by him from plaintiff's possession and control. The clear preponderance of evidence is against this proposition, and satisfactorily establishes that there was a nominal delivery of the deed to defendant after it had been recorded and returned to plaintiff. This explanation of the reason for executing it and having it recorded is unsatisfactory, and was unsupported except by his own testimony, while it is especially contradicted by that of the defendant.

"2. For the purposes of this action it is not material whether the deed was made and delivered with the intent to hinder creditors, or guard against the possible results of the pending suit against Newman, or as a gift or compensation to Edwards. In either case it was a valid transfer as between the parties, voluntarily made, and a court will not compel a reconveyance. But the most reasonable explanation of the transaction is, that the deed was made and recorded by Newman in view of the litigation in which he was involved, without the knowledge of Edwards, and that it was finally delivered to him in the presence of his brother, who could be called as a witness to the occurrence,

with the statement that it was in consideration of an indebtedness to Edwards. This is testified to positively by the witnesses, although denied by Newman; he virtually admits that after Edwards obtained the deed, he acquiesced in Edwards' suggestion that the deed be held by him as a safeguard on account of the pending suit. If the deed was executed, or allowed to remain in Edwards' possession with the intent of hindering or delaying creditors, a court, of course, will not aid either party."

It will be observed that the ground of the plaintiff's claim, as stated in his petition, is, that he executed the deed in question to secure a note given by him to the defendant for the sum of \$60.00, and the further sum of \$440.00 to be thereafter loaned to him. The question of the delivery of the deed seems to be established by a preponderance of the testimony. The defendant in his answer admits the indebtedness to him of \$60.00, but denies the agreement by him to advance the \$440.00 to the plaintiff by way of loan, and denies that the deed in question was executed as a mortgage, but alleges that the plaintiff was indebted to him in a large amount and that the deed in question was executed in satisfaction of the debt. No question of gift, or that the deed was executed to hinder, delay, or defraud creditors, is made in the pleadings. The sole question, therefore, is, was the deed intended as security for the payment of the amount owing to the defendant by the plaintiff? The testimony shows that at the time of the conveyance the land in question was unimproved prairie of good quality, and worth from five to seven dollars per acre.

In regard to the consideration the defendant testifies:

"Mr. Newman took out this deed and handed it to me. To the best of my remembrance, he says: 'I have deeded this land for what I owe you. I don't expect you to lose anything by me.' That is my best recollection."

Q. You may state in that connection how much he owed you at that time, as near as you can get at it, without going into details.

A. He owed me about \$700 ; something near that.

Q. Mr. Newman, in his petition, says you agreed to loan him \$440 at the time the deed was executed ; state what you know about that.

A. I never heard of the \$440 until I got a copy of this complaint.

Q. Did he ever ask you for \$440 about the date of this deed ?

A. He did not.

Q. Did he ask you for any money ?

A. He did not.

Q. He has stated that you held a note of his and that he renewed that note of his about '75 ; what about that ?

A. I did hold a note of his, but that was renewed, I think, about '73.

Q. Can you state whether it was before the date of that instrument or not ?

A. I cannot.

Q. Was it renewed before that deed was delivered to you ?

A. It was.

Q. Did he, at that time or any other, give you a chattel mortgage for the security of that note or any other indebtedness ?

A. He never gave me a chattel mortgage, and I never heard of it until to-day.

Q. Did he inform you he had given a chattel mortgage to anyone else for your benefit ?

A. He did not.

Q. After the execution of that instrument there and the delivery of it, or since, did he ask for a settlement with you ?

A. He did not, except at the time I speak of, in '73. That was before that.

Q. Did you take any other security for his indebtedness to you ?

A. I did not.

Q. What became of that note?

A. I tore it up, after I got the deed.

Q. Did you accept this deed upon those terms?

A. I did—had no doubt but what it was intended as an honest deed.

Q. After the execution of this paper here in '73, in February, did he make his home at your house during the next year or so, or before that?

Objected to as leading.

Q. State whether, after this deed, he made his home at your house, between that time and the date of its delivery.

A. He was there a considerable portion of the time; some of the time he went away.

Q. He has stated you procured this deed from his valise; do you know anything about that?

A. I do not.

Q. I understand you had no settlement with him after the date of this that you know of.

A. Never had.

Q. Did he ever request you for a settlement?

A. He did not.

Q. State what difficulty, if any, you ever had with your uncle.

A. We never had any difficulty until the present one that I know of.

On cross-examination he testified in regard to the claim against the plaintiff:

“My best knowledge of the matter, my best impressions are that he left there about the fall of 1875. And I know from that that it was some three or four years before that, probably three or four years he made our house a stopping place a good portion of the time.

Q. Now you say he did not pay you for that service?

A. He did not.

Q. Did you make any definite charge for the service at the time?

A. We didn't agree on any contract at the time.

Q. Did you set it down, keep any book account?

A. I set it down; we made no agreement about it at all.

Q. How much did you charge for the service?

A. I put it down at \$30 for the eight days; furnished my horse and buggy, and paid my own expenses.

Q. What next did you furnish to Mr. Newman, in value?

A. Well, I helped Mr. Newman along quite a good length of time.

Q. How long?

A. I think altogether it would amount considerably over two years.

Q. Now have you anything other than your general recollection to fix that fact? Did you keep any account of that?

A. I recollect it pretty definitely.

Q. Did you keep any entry of it?

A. I did.

Q. Make charges?

A. I just considered it so much charged, or so much for work.

Q. Where have you got that entry, if at all?

A. I have it on my book at home.

Q. Did you keep an account with Mr. Newman for his board when he stayed at your house?

A. Well, I did; I kept an account; he was not there all the time; a portion of the time.

Q. How much did you charge for that?

A. I charged \$4.50 a week for boarding and washing. I kept a horse part of the time.

Q. How much have you entered as charged to Mr. Newman for that board?

A. I have two years.

Q. Entered in your book?

A. Yes, sir; I consider that I helped him more than that.

Q. How much did you charge for that?

A. I charged \$4.50 a week.

Q. For the whole two years?

A. Yes, sir, and including the board of the horse in that.

Q. As a matter of fact, you said he was not there all the time?

A. He was not there all the time, of course; the two years consist perhaps of three or four years; he would be there perhaps a month or two at a time, and then be gone a week or two, perhaps.

Q. Week by week, time by time, and item by item, have you any definite charge on the book at all?

A. I just put it down on the book.

Q. When did you do it?

A. At the time.

Q. Did he know that you were charging him?

A. There was no agreement or contract about it, he just said he didn't expect me to lose anything by him, that was all the agreement.

Q. Did he know you were making any charges?

A. I don't know that he did.

Q. As a matter of fact, who was furnishing this board, who was keeping house at the time?

A. I furnished the provisions myself.

Q. Was it not a fact that your mother ran the house, and was the head of the house at the time?

A. It was not.

Q. And it was her household?

A. It was not; my mother was an old lady, too old to have charge of the house. I furnished everything, paid the hired help; she had no connection with furnishing provisions at all.

He also testifies that the plaintiff "was there in 1873 some, 1872 some, in 1874 some, and after this transaction he stayed there for a year, perhaps, almost continuously." He also states that he was a witness for the plaintiff three different times, which took three days each time, for which he charged \$33.35. He denies knowing anything about the chattel mortgage, and states that the \$60 note at the time he received the deed amounted to \$74 or \$75, and that on receiving the deed he tore the note up."

A brother of the defendant testifies "that a nephew of the plaintiff was running a store at Bloomingsport for the plaintiff, some sixty or seventy miles from the defendant's residence, and that the plaintiff would come and spend a month at a time, that the defendant's mother was the plaintiff's sister," and the plaintiff seems to have been kindly received and made welcome. The plaintiff himself, on being recalled, testified :

Q. You have heard the defendant state that you were indebted to him in round numbers in \$700 at the time this deed was delivered. Will you state how that was, whether or not you were indebted to him or not?

A. I have no recollection of being indebted. I was at his mother's occasionally, may be two or three days at a time.

Q. That was your sister and his mother?

A. Yes, sir, that was my sister,

Q. What was the occasion of your being there?

A. Well, I had lived in Crawfordsville, about seventy miles west of there, and this store was about thirty miles on a direct line east, and I made it a stopping place as I would go back and forth.

Q. Halting place between the two places?

A. Yes, sir.

Q. You stopped as a matter of visiting two or three days at a time?

A. Yes, sir, some times I would stop two or three days.

Q. Now, Mr. Newman, had you any conversation at any time or any intimation from these gentlemen (pointing to defendants) that there was any charge against you for that board during the time you stopped there?

A. There never was.

Q. You never heard that until to-day?

A. Never.

Q. Was there any other way in which you were indebted to him that you know, except that \$60 note business that you know of?

A. None; when I was there I worked just the same as the family worked.

Q. How did you busy yourself there?

A. I sometimes shucked corn, sometimes helped them thresh and harvest and make fences, and generally helped at things when I was there. I was no idle hand.

There is considerable other testimony of the same tenor as that above set forth. The defendant claims to have made an itemized account of the charges against the plaintiff at the time they occurred. It is unfortunate for him that he failed to offer or introduce such account in evidence. His own testimony shows that he made no claim to the plaintiff for board and services before the execution of the deed in question, nor, so far as it appears, did the plaintiff expect to pay for the same. The most that can be said is, that the plaintiff was a frequent visitor at the home of his sister, the defendant's mother, and frequently remained for several days, occasionally weeks. None of the parties seem to have regarded him as a regular boarder, and it is somewhat remarkable, if there was an intention to charge him for his board and lodging, that no intimation of that fact was given at the time. Then, too, if the deed was given in satisfaction of the debt of \$60 and interest, it is somewhat remarkable that the defendant did not deliver to plaintiff his note. Upon the whole case we are of the opinion that the defendant has failed to establish the payment of \$700, the consideration as claimed.

Driscoll v. Troughton.

About the year 1879 the plaintiff settled on the land in controversy, built a shanty thereon, and in 1880 caused a portion of it to be broken up. The defendant instructed his agent to allow the plaintiff to take all the rents and profits of the land, and he received the same, up to a time shortly before the commencement of this suit. The testimony shows that the defendant has paid taxes on the land for a number of years, and that he has received the rents and profits for two or three years.

The judgment of the district court is reversed. A referee will be appointed to take testimony and state an account between the parties, and upon payment by the plaintiff of the amount due to the defendant as found by said referee, the defendant will be required to convey said land to the plaintiff, free and clear of all incumbrances.

JUDGMENT ACCORDINGLY.

THE other judges concur.

CHARLES F. DRISCOLL, PLAINTIFF IN ERROR, v.
WILLIAM TROUGHTON, DEFENDANT IN ERROR.

1. Verdict. Where there is a conflict in the testimony and it is nearly equally balanced, a verdict will not be set aside as being against the weight of evidence.
2. Instructions set forth in the opinion, *Held*, To be predicated upon the testimony and not erroneous.

ERROR to the district court for Douglas county. Tried below before WAKELEY, J.

Stowe & Day, for plaintiff in error.

A. C. Wakeley, for defendant in error.

MAXWELL, CH. J.

The defendant in error, plaintiff below, filed his petition in the district court, stating as a cause of action that plaintiff is a carpenter and builder; that commencing on or about the 20th day of May, 1884, at the special instance and request of defendant Driscoll, plaintiff performed for said defendant work and labor, to-wit:

June 2, 1883, 10½ days' work.....	\$31 50
" 12, " 5 " "	15 00
" 13, " 8 hours' "	2 40
" 23, " 14 days' "	42 00
Total.....	\$90 90

Defendant has refused to pay the same, therefore plaintiff asks judgment for \$90.90.

The defendant in his answer denies the facts stated in the petition.

The cause was tried to a jury which found a verdict in favor of the plaintiff below in the sum of \$98.75. A motion for a new trial having been overruled, judgment was rendered on the verdict.

The principal error relied upon in this court is, that the verdict is not sustained by the evidence.

The testimony of the plaintiff below was taken by deposition, and is in substance as follows:

"I am a contractor and builder—a carpenter by trade. Driscoll did employ me to work on the Crounse block, corner 16th street and Capitol avenue. One day while at the Crounse block he called me out into the alley back of the block and said: 'Here is a fence I want built.' (A tight board fence six feet high.) He said for me to build this fence and to do all the work that there was to be done in the house and keep it separate from Callan's work. I went and done the work as he directed. He said 'present

my bill to him when the work was completed, and he would pay it.' John Henry Vickery was present at the time. I did work for Driscoll under the agreement upon the fence and Crounse building by myself and others as follows:

June 2d to 12, '83, 10½ days.....	\$31 50
“ 12, 5 “	15 00
“ 13, 8 hours.....	2 40
“ 13 to 23, 14 days.....	42 00
Total.....	<u>\$90 90</u>

“The work inside of Crounse block consisted of work upon windows, doors, elevator, basement floor, and other work; also fence and sidewalk were built as per agreement; don't remember particularly the items. The prices charged are fair, market prices. Have never received a cent from any one on this work. I presented my bill to Driscoll, but he refused to pay it.”

J. H. Vickery testified in substance as follows:

“In May and June, 1883, I did some carpenter work on the Crounse building, 16th street and Capitol avenue. I was present at a conversation at Crounse block between Driscoll and Troughton in reference to certain work to be done about the building. Tom Callan was there. Troughton asked Driscoll how he should put up the fence. Driscoll told him. Troughton said some sheds and buildings were in the way. Driscoll said never mind; take them out of the way, and put it up just six feet from the wall. A piece of the sidewalk north of the building was torn up. Driscoll told him to put that down.”

Q. What else did Driscoll say?

A. That Troughton should make out his bill as quick as he got through and fetch it to his office and he would pay it. I worked for Troughton; helped put up the fence; helped put that piece of sidewalk down; put some bars over windows in sidewalk, and did work on the inside. Troughton did some work for Callan separate from his

Driscoll v. Troughton.

building; there were some screen doors made for Callan. The fence made is on the east side of the Crounse building. Don't know who put down sidewalk in area. I put in bars over the windows. I did no work for Troughton on windows or doors, only the screen doors. I did work on fence, sidewalk, and partitions in basement. Judge Crounse was not present at time of conversation. I was not sitting on a beer keg; I was working on the fence.

Q. Did Driscoll say what work he wanted Troughton to do?

A. All he told him about was the fence.

Q. Was there any other work inside the building he directed to be done?

A. Not at that time. Don't remember how high the fence was.

On cross-examination he testified:
work for Driscoll. There were some doors fitted up in the
"Mr. Callan was present at the time of the conversation between Driscoll and Troughton. The conversation had about building the fence was when we three were there together, and it is the only conversation about building the fence as far as I know. Callan took part in the conversation and heard what was said at the time, and all of it. I could not tell what Callan said. I did not take any part in the conversation. Troughton and I were building the fence at the time. I don't know who ordered the work inside of the house. I know about the fence because that was the only conversation I heard; the rest I heard nothing about. Callan, Driscoll, Troughton, and myself were present. Callan and Driscoll had some conversation out of my hearing."

He testified on re-direct examination:

"Driscoll said to Troughton: Keep the two bills separate, so they won't get mixed up. I don't know all of the work that was being done for Driscoll or Callan, that ought to have been kept separate. Don't know that Driscoll had any interest in it."

This testimony is denied by the defendant below, plaintiff in error, and by one or two other witnesses, but the evidence is nearly equally balanced.

The verdict, therefore, cannot be set aside as being against the weight of evidence.

The court instructed the jury as follows:

"1. The plaintiff's claim in this case is for work and labor alleged to have been performed by himself and his employes, at the request and upon the credit and responsibility of the defendant, Driscoll.

"2. One of the disputed questions, and perhaps the one principally in dispute, is, whether or not the work sued for, or any of it, was so done upon Driscoll's credit and responsibility; the plaintiff claiming that Driscoll promised to settle with plaintiff for the work; and defendant denying this, and denying any promise or liability to the plaintiff.

"3. It does not seem to be established or claimed, that Driscoll was the owner of the building or premises on or about which the work was done; or that he had any interest in them which would make him liable, without an agreement or promise on his part—so that the plaintiff's claim rests upon the alleged promise or undertaking of Driscoll that he would settle for, or, in effect, be responsible for the work.

"4. If you find from the evidence that at or prior to the time when plaintiff did the work, Driscoll promised the plaintiff as above mentioned, and that the plaintiff did the work relying upon such promise and looking to Driscoll therefor, the plaintiff is entitled to recover therefor, notwithstanding Driscoll had no interest in the premises. But if it was agreed that plaintiff should do the work for Callan or look to him for the pay, or that plaintiff had a settlement with Callan which included or covered the work here sued for, then plaintiff cannot recover.

"5. So far as there is a conflict in the evidence, it is your

sole province to reconcile it if you can; or, if you cannot, to determine which is true and which is untrue, and you are to give such weight to the testimony of any witness as you may deem it entitled to under all the circumstances of the case.

"6. The burden of proof is upon the plaintiff to establish his case by a fair preponderance of evidence to your satisfaction. If he has failed in that, you should find for defendant. But if he has so established his claim, either as to the whole or any part of it, then, to the extent to which he has so established it, you should find for the plaintiff, adding interest at 7 per cent per annum to the first day of this term, viz.: October 5, 1885."

These were excepted to by the defendant below, and the giving of the same is now assigned for error.

The instructions conform to the testimony in the case, and there was no error in giving the same.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

THE STATE OF NEBRASKA, EX REL. R. D. STEARNS,
v. R. H. CORNER, W. M. GILLESPIE, M. D. TIF-
FANY, AND E. C. WIGGENHORN.

22	265
48	65

1. **Constitutional Law: REGISTRATION OF VOTERS.** Under the constitution of the state of Nebraska, which prescribes the qualifications of voters, and provides that all elections shall be free, and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise, a registration law which absolutely deprives an elector of the right to vote unless registered on one of four days, the last one being ten days prior to the election, is void.

2. ———: ———. A registry law, so far as it provides for a register of qualified electors to be made, and which constitutes such registration one mode of proof of the elector's right, and so far as it might require an elector whose name is not upon such register to make other reasonable proof of his right to the judges of election at the time of offering his vote, would be valid. But where it absolutely deprives the elector of his vote unless previously registered upon certain days named in the law, it is void.
3. ———: ———. A registry law, to be valid, must be reasonable and impartial, and calculated to facilitate and secure the constitutional right of suffrage, and not to subvert, or injuriously, unreasonably, or unnecessarily restrain, impair, or impede the right. *Vide Daggett v. Hudson*, 43 Ohio St. Rep., 548.
4. ———: ———. The act "to amend the election laws for metropolitan cities and cities of the first class in the state of Nebraska" (Laws 1887, 394), being in contravention of that clause of the constitution that "no bill shall contain more than one subject, which shall be clearly expressed in its title, and no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed," is void.

ORIGINAL action in the nature of *quo warranto* to test the right of respondents to hold offices as judges of election in the fourth ward of the city of Lincoln under the provisions of Laws 1887, Ch. 39.

C. O. Whedon and Harwood, Ames & Kelly, for relator.

Billingsley & Woodward, for respondents.

REESE, J.

The question presented in this cause is the constitutionality of chapter 39 of the session laws of 1887 (Compiled Statutes 1887, Ch. 26a). The principal contention is, that the act violates the provisions of section 22 of the bill of rights, article 1 of the constitution of this state. This section is as follows: "All elections shall be free; and there shall be no hindrance or impediment to the right of a qual-

ified voter to exercise the elective franchise." The act in question consists of 82 sections, and cannot be set out without extending this opinion to an unreasonable length, however desirable it might be to do so. We therefore must be content to refer to what may seem to be the more objectionable sections, as briefly as may be, yet giving them such consideration as the importance of the question requires.

The title of the act in question is, "An act to amend the election laws for metropolitan cities, and cities of the first class in the state of Nebraska."

So far as the subject of registration is concerned it must be sufficient to say that it is made the duty of the city council of cities of the class named in the act to appoint four judges of election and two poll clerks for each election district, in the month of September of each year, the officers so appointed to hold their offices for the term of one year, unless sooner removed by the mayor. The judges of election shall constitute the board of registration, each one of whom shall be provided with a register. They shall meet together and organize as such board and register such electors of the election district as may personally appear for that purpose on the following days, and *then only*, to-wit: On Tuesday four weeks, the Wednesday of the third week, and Friday and Saturday of the second week preceding the day of the November election in each year. No person shall be registered except those who personally present themselves for that purpose, and to all such an oath must be administered to truly answer such questions as may be put to them touching their place of residence, name, place of birth, qualifications as an elector, and right to register and vote.

The examination resulting in favor of the applicant, his name is entered upon each of the four registers, the proper memorandum being made in the several columns thereof. On each day of general registration, and before adjourning,

the board is required to "enter in each of two books prepared for that purpose, one of which shall be known as the public copy of the registers, and the other of which shall be known as the election bureau copy of the registers, all such names and residences, and all such dates, information, and statements as during the day have been entered by the judge of election in the registers provided for" by the act. "The whole six books shall, on each of said days, after a completion of such copies of the registers, be carefully compared throughout, so that each of the registers and copies thereof shall in every respect agree with each other, and contain the name and residence of each person who shall have applied for registration, and the fact respecting him, as the same shall have been stated by him and entered in their registers." The time in which the board may be in session each day is from eight o'clock in the morning until nine o'clock in the evening. "For all powers, authority, and duties" prescribed, and "all actions of the board, or of said judges, save where such authority is specifically allowed to each of said judges, the concurrence or assent of a majority of all the judges of election in any election district, must in all cases be obtained." Section twenty-four of the act contains the following provision: "The judges of election in each election district of the city shall, on the day of any election therein, have with them, at the polling place in said district, the registers provided for in this chapter. They shall each make use of one of said registers for guidance on said day, and no vote shall be received from any person whose name shall not be found by at least three (3) of them, to be upon at least three (3) of said registers as a qualified voter. The chairman of the judges in such election district shall, if present, and if absent, then one of the other judges, shall, upon any person offering to vote, announce in a loud, clear, and distinct manner the name of such person, and no ballots shall be received by either of the judges and de-

posited in any of the ballot boxes, until at least three of said judges shall, as hereinbefore provided, have examined and found the name of such person, and have declared the same, and that such person is entered as a qualified voter, when, if the vote of such person is received, at least three of the judges shall write in the appropriate column, bearing the heading 'voted,' and opposite the name of such person, the word 'yes.'"

By the foregoing it will be seen that the right of any elector to vote must depend upon his registration within the four days set apart for that purpose, and upon the further fact that on election day his name must be found by at least three of the judges upon three of the registers. If not registered *on one of those days*—no matter what may have prevented—he can not vote. If he has registered and by mistake his name has been left off two of the registers, he is equally disfranchised. He cannot register, nor can the registry be corrected on election day.

We enter upon the examination of the question involved in this case with a full appreciation of its gravity and of the reluctance of courts to set aside the acts of the legislature as unconstitutional, and are mindful of the well established rule, that a law will be upheld if it can without doing violence to the fundamental law; yet it is a judicial duty, and one from which we cannot escape, to carefully consider the question, and if the act is in violation of the constitution to so declare it.

Section 1 of article VII. of the constitution—entitled Rights of Suffrage—provides that every male person of the age of twenty-one years, of the classes enumerated, "shall be an elector," and, of course, entitled to vote. Would the act in question hinder or impede the exercise of that right? This question is not a new one in this country, and the decisions of courts of last resort in the different states have been substantially unanimous in holding such laws absolutely void. It has been quite as uni-

formly held that proper and reasonable registration laws are valid, not as imposing an additional necessary *qualification*, created by statute, but as a method of *proving* the existence of the qualifications required by the constitution. This, so long as kept within the bounds of reason, is deemed to be a proper and just protection against fraud, and a preservation of the purity of elections, upon which must depend the safety and perpetuity of republican forms of government.

In *Dells v. Kennedy*, 49 Wis., 555, it was held by a majority of the court that where an elector possessed the qualifications prescribed by the constitution as an elector, he was vested with the constitutional right to vote, and that it was not within the power of the legislature to change, impair, add to, or abridge it in any respect, and that an act which provided that no vote should be received at any general election, unless the name of the person offering to vote be on the register previously completed by a board of registry, was void. The same in substance was declared to be the law in *The State v. Baker*, 38 Id., 71.

In *Daggett v. Hudson*, 43 Ohio St., 548, the same question was before the supreme court of Ohio, and the same conclusion was reached, after a careful examination and collation of the decisions of the supreme courts of the various states, in an exhaustive opinion written by Judge Atherton. Among the cases examined as sustaining the decision of that court were: *Page v. Allen*, 58 Pa. St., 338; *Dells v. Kennedy*, *supra*; *State, ex rel. Wood, v. Baker*, 38 Wis., 71; *Edmonds v. Banbury*, 28 Iowa, 267; *Monroe v. Collins*, 17 Ohio St., 666; and to which we may add *White v. The County of Multnomah*, 10 Pac. R. (Or.), 484. Some of the cases cited go to the extent of holding that any law requiring the registration of voters is void, as hindering and impeding the exercise of the elective franchise, but we are quite well convinced that such holding is clearly at variance with reason and the weight of authority. The

true rule undoubtedly is, that the legislature may require registration under reasonable restrictions as proof of the possession of the qualifications prescribed by the constitution, but that the voter shall have the right to prove himself to be an elector, register and vote at any time prior to the closing of the polls on election day. It would doubtless be competent to require more proof on that day than if the voter had previously registered, but it should be left within his power to furnish such proof, if it existed, and exercise his right. As said in some of the decisions referred to, the fact that the name is not on the register is a challenge by statute of the person offering the vote, and that challenge should be overcome by proof. But this is not the case before us. By the act under consideration but four days in the year are given to register, and then only when three of the judges of election are present. It matters not how imperative the demands of the voter elsewhere during those four days may be, or whether his absence is enforced by sickness of himself or family, or unavoidable detention from the voting district in which he may reside, he is disfranchised. Furthermore, he may appear before the judges for the purpose of registration, and, although he may have been a resident and voter in the election district for a quarter of a century, take the required oath, answer the questions propounded, in short, comply with the requirements of the law in every particular; yet, if on election day his name is not found on *three* of the four registers, his vote cannot be received. The suggestion that such a law would not be a "hindrance or impediment to the right of a qualified voter to exercise the elective franchise," as is forbidden in the section of the constitution above quoted, is so manifestly unreasonable that the necessity for further argument ceases.

There are other considerations presented affecting the constitutionality of the act in question, which we deem it necessary to notice briefly.

The first section is clearly amendatory of section 8 of chapter 41 of the Compiled Statutes of 1885. By that section certain days are declared to be public holidays to be observed in the matter of the presenting and protesting of commercial paper. The section under consideration amends that section by adding to the days named the days upon which general or local elections shall be held in the cities named; yet no reference is made to the section amended as required by section 11 of article III. of the constitution. Applying the rule stated in *Smails v. White*, 4 Neb., 353, there would seem to be an infraction of the constitution in this particular.

Section 247 of the criminal code defines the terms "felony" and "misdemeanor" to be, that a felony is such an offense as may be punished by death or imprisonment in the penitentiary, and "any other offense is a misdemeanor;" while sections 68, 70, and 71 of the act under consideration seem to ignore this section, and declare persons convicted of the offenses mentioned guilty of a *misdemeanor*, but fix the punishment at confinement in the penitentiary.

The act is quite crude, and it would be quite impracticable, if not impossible, to comply with many of its provisions.

By section 3 of the act to incorporate metropolitan cities, it is provided that such cities may include an area not to exceed twenty-five square miles, including any township or village organization within such limits, which organization shall thereupon terminate. This must necessarily include territory remote from the business center of the city where large buildings, telegraph stations, etc., could not be found, but the act requires that no place shall be designated by the mayor as a place for holding elections which will not provide an unoccupied space allowed in front of the ballot boxes, which shall be equivalent to "forty feet square," sixteen hundred square feet. A patrolman shall carry the result of the election, as found by

the canvass, "to the police headquarters where the polling is located; and the captain or sergeant or other officer in charge shall immediately transmit by telegraph or otherwise, the result of such statement to the city council."

By section 57 a number of acts and omissions are declared to be illegal, and it is declared that if any person shall aid, counsel, or advise the commission of any act forbidden by law or by the act (many of which are simple misdemeanors of the lower class), or shall omit to do an act required by law to be done, the party guilty of the act or default shall be adjudged guilty of a felony, and committed to the penitentiary for a term not less than one nor more than five years. All the expenses of an election in any *county* are declared to be a *city* charge, by the eighty-first section of the act.

These provisions (and many others which might be cited) are noticed for the purpose of calling attention to the fact that in its passage the act has not received the care which should be given to the enactment of laws. From a comparison with the election law of the state of New York applicable to the city of New York, it is plain that the act in question has been created by a somewhat random selection of sections from that law without any reference to their adaptability to the laws and constitution of this state or our system of government, and hence is almost, if not entirely, incapable of enforcement.

The act being unconstitutional, the prayer of the petition is granted.

JUDGMENT ACCORDINGLY.

THE other judges concur.

CHARLOTTE A. DELANEY, PLAINTIFF IN ERROR, V.
 CHRISSEY LINDER AND OTHERS, DEFENDANTS IN
 ERROR.

1. **Contract: CONSTRUCTION.** The contract sued on examined and construed.
2. ———: ———. When a contract has been reduced to writing, as a general rule of law verbal evidence is not allowed to be given of what passed between the parties either before the written instrument was made or during the time of its preparation, so as to add to or subtract from or in any manner to vary or qualify the written contract.
3. ———: ———: **EVIDENCE.** After a contract has been reduced to writing, it is competent for the parties, at any time before breach of it, by a new contract, not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary or qualify the terms of it; which is to be proved partly by the written agreement and partly by the subsequent verbal terms, engrafted upon what will be thus left of the written agreement.

ERROR to the district court for Lancaster county. Tried below before CHAPMAN, J.

Marquett, Deweese & Hall, for plaintiff in error.

J. R. Webster, W. E. Stewart, and Charles H. Foxworthy, for defendants in error.

COBB, J.

This was an action of ejectment for a certain lot and house, which the plaintiff had sold to the defendants on contract, which contract plaintiff claimed the defendants had forfeited by failing to make the payments therein provided for.

There was a second trial to the court, with findings and judgment for the defendants. The plaintiff brings the cause to this court on error and assigns the following errors:

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1. The decision and judgment of the court was not sustained by sufficient evidence.
2. The decision of the court was contrary to law.
3. The court erred in excluding evidence that was offered by plaintiff to show the real contract that was made between the parties as to the sale of the lot and the payment of interest on the deferred payments.
4. For errors of law occurring at the trial and excepted to by the plaintiff.
5. The court erred in rendering a decision against the plaintiff and in favor of the defendant.
6. The court erred in overruling the motion of the plaintiff for a new trial.

I copy from the bill of exceptions the contract of sale under which the defendant went into the possession of the premises :

"This agreement, made this 18th day of June, in the year 1885, between Charlotte A. Delaney, of the first part, and Chrissie Linder, of the state of Nebraska, of the second part, witnesseth, that in consideration of the stipulations herein contained, and the payments to be made, as is hereinafter specified, the first party hereby agrees to sell unto the second party lot E of Brock's subdivision of lots one and two in block eighty-seven (87), city of Lincoln, Nebraska, for the sum of three thousand dollars, on which the said second party hath paid the sum of forty dollars, being the first monthly payment. And the said second party, in consideration of the premises, hereby agrees to pay to the first party, at First Nat. Bank, Lincoln, Neb., the following sums of principal and interest, at the several times named below :

When Due.	Interest.	Principal.	Amt. Evidence of Payment.
" Due Aug. 1, 1885	\$40
" Sept. 1, 1885	40
" Oct. 1, 1885	40

And forty dollars on the first day of each month thereafter, until this contract is fulfilled. Said payments to bear 7 per cent interest per annum, payable with each payment. After 12 payments are made the first party agrees to make deed and take a mortgage for balance of payments.

"And it being mutually understood that the above premises are sold to the said second party for improvement and cultivation, the said party hereby further agrees and obligates herself, heirs, and assigns, that all improvements placed upon said premises shall remain thereon and shall not be removed or destroyed until final payment for said land. And further, that she will punctually pay said sums of money above specified as each of the sums become due, and that she will regularly and seasonably pay all taxes and assessments upon said premises for the current year of 1885 and thereafter.

"In case the said party, her legal representatives or her assigns, shall pay the several sums of money aforesaid punctually and at the several times above mentioned, and shall strictly and literally perform all and singular the agreements and stipulations aforesaid after their true tenor and intent, then the first party will furnish to the said second party, her heirs or assigns (upon request of the first party at Lincoln, Nebraska, and the surrender of this contract), a good and sufficient warranty deed free and clear of all incumbrances, except as against such taxes as may be assessed against said lands, and as against any and all acts done and suffered by said purchaser or her assigns, subsequent to the date of this contract.

"But in case the second party shall fail to make the payments aforesaid, or any of them, punctually and upon the strict terms and times above limited, and likewise to perform and complete all and each of the agreements and stipulations aforesaid, strictly and literally, without any failure or default, the times of payment being of the essence of this contract, then the party of the first part shall have the

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right to declare this contract null and void, and all rights and interests thereby created or then existing in favor of the said second party, or derived under this contract, shall utterly cease and determine, and the premises hereby contracted shall revert to and revest in said first party (without any declaration of forfeiture or any act of re-entry, or without any other act by said first party to be performed, and without any right of said second party of reclamation or compensation for moneys paid or improvements made), as absolutely, fully, and perfectly as if this contract had never been made, and it is further agreed on the part of the purchaser that a failure to pay any installment of principal or interest, or a failure to keep any of the covenants and agreements herein made by her, shall work a forfeiture of all her rights, and that thereupon the first party, if she so elects (and the purchaser hereby waives any notice of such election), treat the purchaser as a tenant holding over and at sufferance, and proceed against said purchaser by summary action of forcible entry and detainer to recover possession. And it is further stipulated that no assignment of the premises shall be valid unless the same shall be endorsed hereon or permanently attached hereto and countersigned by the first party (for which purpose this contract must be sent to her by mail or otherwise), and that no agreement or condition or relations between the second party and her assignees, or any other person acquiring title or interest from or through her shall preclude the first party from the right to convey the premises to the said second party or her assignees on the surrender of this agreement, and the payment of the unpaid portion of the purchase money which may be due to the first party. In witness of which both parties have signed these presents, in duplicate, on the day and year above written."

Signed and acknowledged by both parties.

There was evidence that at the time of the making of the contract the premises were in the possession of one Gasford, a

tenant of the plaintiff. His tenancy seems to have been from month to month. He received no notice of the sale of the premises, or that the plaintiff desired him to remove therefrom, until on or about the last day of June, and being unable to procure another house, he did not vacate the premises until the 16th day of July. There is also evidence tending to prove that there was an agreement or understanding between the plaintiff and defendant, that the first or cash payment, which is admitted not to have been made at the date of contract, as therein expressed, should not be made, nor the time upon which the monthly payments were to be computed commence to run until the plaintiff should be able to deliver possession of the premises to the defendant, which she could not then do on account of their occupancy by Gasford.

It seems that the contract was left at the First National Bank until the defendant got the possession of the premises, at which time, or shortly afterwards, she made the first or cash payment at the bank and took up the contract. This payment was made on the 27th day of July. Upon the defendant's theory no interest, or but a trifle, was due on this payment. The second payment of \$40 was made on the 7th day of September, and no interest was paid on it. The third payment of \$87.42 was made on the 20th day of October.

It appears that on the 15th day of October, five days before the last payment was made, as stated above, the son and agent of the plaintiff served upon the defendant a demand in writing for the payment of principal, alleged to be due October 1st, and interest, to the amount of \$64.18, and notifying her that unless the same be paid within five days, he would take steps to annul the contract and recover possession. By said demand and notice plaintiff ignored the oral modification of said contract, as claimed by the defendant, whereby the payments were to commence to run at the date of the delivery of the possession of the premises

to her, and claimed interest, on monthly rests, upon the whole of the unpaid principal. The defendant tendered a payment of \$40, on the 9th day of November, which was refused.

Upon the trial, the defendant tendered to the plaintiff the sum of \$1,006.80. The plaintiff offered to prove by the person who drew up the written contract, and other witnesses, that "the matter of the computation of interest was talked over there at the time the contract was drawn, and it was the intention of the parties who were drawing this contract that the payment of interest with each \$40.00 was to be the interest on the full purchase price that was unpaid at that date," which offer being objected to by defendant, the objection was sustained. This ruling of the court is assigned as error.

This case seems to turn upon the two points contended for by the defendant, to-wit :

1. That by the terms of the contract, she was only to pay the sum of forty dollars each month, and interest on forty dollars from the date of the contract to the time of such payment.

2. That by the subsequent oral agreement between the parties the time for the making of the first or cash payment was changed from the 18th day of June, the day on which the contract was actually made, to the 16th or 17th day of July the day on which she was let into possession.

Upon a careful reading of the contract, we are all of the opinion that the defendant's construction of its terms is correct, and that it will bear no other.

Upon the second point there is a sharp conflict in the evidence. The defendant swears to it, and the plaintiff denies it. It would be sufficient for our purpose that the trial court, whose especial province is to weigh and decide upon the effect of conflicting evidence, decided in favor of the defendant, but it may not be out of place to observe that it was altogether reasonable and just that the plaintiff,

being unable to deliver the premises promptly, should have agreed to a suspension of her right to demand the payment of either installments or interest until the defendant was let into the use and enjoyment of the property.

Upon the point arising upon the refusal of the court to let in evidence to vary the terms of the contract, it is deemed sufficient to say that the contract is sued on, and set out in the petition without any allegation of mistake or failure therein to truly express the terms of the contract, or prayer for its reformation, and it is deemed to be too well settled to call for the citation of authorities that such allegation and prayer are indispensably necessary as a foundation for the admission of such evidence. The following from the opinion of Denman, C. J., in the case of *Goss v. Lord Nugent*, 5 Barn. & Ad., 64, cited in the opinion in *McNish v. Reynolds*, 95 Pa. S., 483, is believed to possess the rare merit of being applicable to, if not conclusive of, both the above points. "By the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made or during the time it was in a state of preparation so as to add or subtract from, or in any manner to vary or qualify the written contract; but after the agreement has been reduced into writing it is competent to the parties at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement."

There was a supplemental answer filed by the defendant, setting up an accord, satisfaction, and settlement of the matters involved in the case after the filing of the original

Estabrook v. Hateroth.

answer, which was denied by the plaintiff, and quite a mass of testimony was taken, applicable to the issue thus raised. No point, however, is made upon this branch of the case, either in the petition in error or the brief of counsel. It has, therefore, not been examined.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

HENRY D. ESTABROOK, PLAINTIFF IN ERROR, V. MRS.
E. W. HATEROTH, DEFENDANT IN ERROR.

29	281
23	269
23	404
29	281
27	796
22	281
37	258

Forcible Entry and Detention. The action of forcible entry and detainer under the statute being a civil remedy to recover the possession of premises unlawfully and with force withheld from the plaintiff, it will be sufficient to sustain the charge of forcible detainer, that the party unlawfully in possession refuses to vacate the premises on lawful notice so to do. *Campbell v. Cooneradt*, 22 Kans., 704, approved and followed. *Myers v. Kosnig*, 5 Neb., 419.

ERROR to the district court for Douglas county. Tried below before WAKELEY, J.

Estabrook & Irvine, for plaintiff in error.

John L. Webster, for defendant in error.

MAXWELL, CH. J.

This is an action of forcible entry and detainer brought before a justice of the peace in Douglas county to recover the possession of a dwelling house in the city of Omaha. Judgment was rendered before the justice in favor of the

plaintiff. On appeal to the district court, judgment was rendered in favor of the defendant.

The testimony tends to show that in July, 1882, one Margaret McCoy owned an undivided half interest in the property in question, the other half being owned by one Vorce, the latter, being in possession and receiving the rents and profits; that Mrs. McCoy consulted the plaintiff as to the best means of securing her rights, and being without funds to prosecute an action, it was agreed that the plaintiff should take the necessary steps to enforce her rights at his own costs and expense, the proceeds of the litigation or compromise to be equally divided between the plaintiff and Mrs. M.; that in pursuance of this agreement, the plaintiff entered into negotiations with Mr. Vorce, who, after consulting with his attorneys, conceded the right of Mrs. McCoy to an undivided half of the property in dispute. Mrs. McCoy thereupon took possession of the dwelling in controversy. The plaintiff testifies that, "Mrs. McCoy having possession of that place early in 1883, turned over to me the west half of the double frame building, and I received the rents from that house for several months, receipting for them in my own name, and gave notice to the tenants to quit in my own name, and rented it—I won't say that—I didn't rent it, until finally one day she came to me and said her daughter, who was occupying the east half of the double frame building, wished to exchange, and I exchanged the west half for the east half, and gave notice to my tenant to quit, purely as a matter of accommodation to Mrs. McCoy. No sooner was my tenant out, than that very day—certainly the next morning—possession was taken by a man named Davis; at that same time, either that day or the next day afterward, a deed was filed of Mrs. McCoy's entire interest in that property to William Vorce. I commenced a forcible entry and detainer suit.

"I commenced suit and prosecuted it to final judgment.

Here is the complaint in that forcible entry and detainer suit. [Producing a paper.] I was placed again in possession of that property by the officer."

In this he is corroborated by the testimony of Mrs. McCoy. The plaintiff having obtained possession of the premises under the proceedings mentioned in his testimony, thereupon leased the same to Davis by the following instrument :

"OMAHA, July 20, 1883.

"This mem. witnesseth that W. P. Davis rents of E. & H. Estabrook the east one-half of double house, lot 7, block 22, for an indefinite period. That in the event of moving, said Davis agrees to hold possession for said Estabrook until they procure other tenants. Terms, \$12 per month in advance.

"W. P. DAVIS,

"H. D. ESTABROOK."

On the 26th day of May, 1883, Mrs. McCoy conveyed all her interest in the property in question to Vorce, the deed being filed for record on the 30th of that month. The plaintiff seems, however, afterwards to have remained in possession of the premises by his tenant, and remained in possession until the 4th of September, 1883. On that day it is alleged that Davis moved out of the dwelling in controversy, and that the defendant on the same day rented said dwelling from the attorney of Vorce, received the key from Davis, and on the next day took possession of the property. The defendant claims to have had no notice, either actual or constructive, of the interest of the plaintiff in the dwelling in dispute.

The principal error complained of is in giving the following instruction :

"As to the character of acts which would constitute force within the meaning of the law, it is not sufficient that the entry or the detention, or both, were unlawful and against the consent of the plaintiff, or that possession was obtained

by unlocking the door with a key obtained from a tenant then, or lately, in possession, or that the defendant, after demand of possession by plaintiff, refused to surrender them. But if you are satisfied from the evidence that defendant was prepared, and intended to retain the possession by force and violence, and that plaintiff was justified in so believing, this would be sufficient to show such force as the law contemplates." This was excepted to, and is now assigned for error.

Section 1019 of the civil code provides that, "Any justice, within his proper county, shall have power to inquire, in the manner hereinafter directed, as well against those who make unlawful and forcible entry into lands and tenements, and detain the same, as against those who, having a lawful and peaceable entry into lands and tenements, unlawfully and by force hold the same; and if it be found, upon such inquiry, that an unlawful and forcible entry has been made, and that the same lands or tenements are held by force, or that the same, after a lawful entry, are held unlawfully, then said justice shall cause the party complaining to have restitution thereof."

The proper construction of a similar section in the code of Kansas was before that court in *Campbell v. Conradt*, 22 Kas., 707, where it is said: "The object of the statute is to prevent fights, violence, or other breaches of the peace, and a party who is wrongfully ousted in his absence of his premises by another, and on demand is refused possession, need not put himself in danger of personal violence before availing himself of the statute. If the defendant owns the property in question the law has provided abundant means through and by which he can assert his rights without the unlawful action taken by him. He had no right to use force to possess himself of the lot. *Ainsworth v. Barry*, 35 Wis., 136. *Jarvis v. Hamilton*, 19 Wis., 202. *Allen v. Tobias*, 77 Ill., 169. *Childress v. Black*, 9 Yerg., 317. *Minor v. Duncan*, 54 Ga., 516. *Emsley v. Ben-*

nett, 37 Iowa, 15. Many of the decisions referred to by counsel for defendant are not applicable under the provisions of our statute of forcible entry and detainer. Those which require a great degree of force or personal violence to be used, or threatened, in order to constitute forcible entry or forcible detainer, are not satisfactory in view of the fact that one of the main purposes of the law is to preserve the peace and quiet of society."

The case was again before the supreme court of that state, and is reported in 25 Kas., 227, where the former ruling was adhered to.

At common law a forcible detainer is, "Where one who has entered peaceably retains his possession by force, as if he threatens to do bodily harm to any person who shall attempt to enter, uses a larger quantity of arms than is usual for protection, or assembles a crowd of people to repel the approach of others." 3 Chitty Cr. L., 1121. And the punishment being by indictment, it was necessary to charge therein an actual breach of the peace and violence, as no indictment would lie for a mere civil injury, however obnoxious the trespass. 3 Burr., 1701, 1706, 1731. 8 T. Rep. 3 Chitty Cr. L., 1121.

The words, "with a strong hand," distinguish the indictable offense from the civil trespass, and at least a public breach of the peace must appear. 8 T. Rep., 361. 3 Chitty Cr. L., 1123. Under the statute, however, the action of forcible entry and detainer is not a criminal proceeding. It is designed as a speedy and effective means to recover possession of premises from persons unlawfully and with force holding the same. The word "force" is used in a very different sense from the construction placed upon it at common law; it simply means the refusal of a party unlawfully in possession of premises to which he has no right of possession to leave the same.

In *Myers v. Koenig*, 5 Neb., 422, it is said: "One great object of the forcible entry act is to prevent even rightful

owners from taking the law into their own hands, and attempting to recover by violence what the remedial powers of a court would give them in a peaceful mode."

This, in our view, is a correct statement of the law, and will be adhered to. The instruction above set forth is therefore erroneous, and the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

22	286
25	147
29	286
43	549
27	286
48	84

R. A. STEWART, PLAINTIFF IN ERROR, V. RUDOLPH SCHNEIDER, DEFENDANT IN ERROR.

1. **Water Course: OBSTRUCTIONS: OVERFLOW.** A and B were owners of adjoining lands over which the waters of Spring branch flowed without any definite channel. A, to protect his land against such flow, dug a ditch along the line between himself and B, and raised an embankment along said ditch, and thereby obstructed the natural flow of water from the land of B. B thereupon enjoined A from keeping up said embankment, and a decree by stipulation was entered whereby A was required to make and keep three openings, each at least one rod in width in such embankment. Afterwards the lands of B were overflowed by the waters of Spring branch being thrown back upon them. A verdict having been returned in favor of B for \$275 damages, *Held*, First, that if the overflow was caused by A closing the openings in the embankment in question, he was liable for the damages resulting therefrom. Second, there being a direct conflict in the testimony as to the character of the embankment and the cause of the injury, the case was one proper to submit to a jury.
2. **Instructions set out in the opinion, *Held*, Properly given, and certain instructions asked properly refused.**

ERROR to the district court for Nemaha county. Tried below before POUND, J.

J. R. Webster and *W. E. Stewart*, for plaintiff in error

1. But for the stipulation and decree in the former action curtailing the rights of the defendant Stewart's dominion, he might lawfully have done all that he is charged with doing; that is, have diked his land against the flow of surface water. There was no course for the water that had been lost in the morass, and it is but ordinary straggling surface water that in times of rain and flood came out over these lands. These Stewart might divert. *Pyle v. Richards*, 17 Neb., 181. *Davis v. Londgreen*, 8 Neb., 43.

2. On the evidence the defendant should have had a verdict. There was no obligation of maintenance on Stewart's part, and the work, if once done, discharged him of all obligation except to permit the flow to continue. It would require proof of active interference on his part, and there was none. The verdict was therefore not sustained by sufficient evidence, and is contrary to law.

3. There was fatal error in the instructions.

Contributory negligence of the plaintiff bars recovery if by ordinary care damages might have been averted. *Omaha Horse Railway Co. v. Doolittle*, 7 Neb., 485. *Johnson v. M. P. R. R. Co.*, 18 Id., 691.

4. Where there was an attempt to perform and no complaint of the manner of performance, the case is analogous to a case of contract and like attendant circumstances, and in such case there should be a notice or demand from the one claiming performance had not been done upon the one required to perform. Till demand no action lies. *Woolner v. Hill*, 93 N. Y., 577. *Davison v. Jersey Company Associates*, 71 N. Y., 333. *Hayes v. Morrison*, 38 N. H., 90.

W. H. Kelligar and *J. S. Stull*, for defendant in error.

1. In this case the question involved is one of fact, and to a great extent depends upon the degree of credit to be given to the witnesses; on the point whether the three openings were made at the time and in the manner required by the stipulation and decree, there was a direct conflict between plaintiff's and defendant's witnesses, and it is evident that both cannot be true. This being the case the jury were the sole judges of their credibility and the verdict must stand. *Donovan v. Yard*, 16 Neb., 34. *High v. Merchant's Bank*, 6 Neb., 155. *O'Leary v. Iskey*, 12 Neb., 136.

2. On instructions cited. *Tootle v. Clifton*, 22 Ohio State, 254. 1 Sutherland on Damages, 245. 3 Id., 381.

MAXWELL, CH. J.

The plaintiff alleges in his petition, "that the said plaintiff was the owner of and in the actual occupation and possession of the north-east quarter of section nineteen, town four N., range fourteen east, Nemaha county, Nebraska, from about the first day of January, 1880, until about the first day of June, 1885; that the defendant was, and yet is, the owner of and in the actual occupation and possession of the east half of the south-west quarter, and the west half of the south-east quarter of section nineteen, town four N., range fourteen east, Nemaha county, Nebraska; that in the summer of 1882, the said defendant proceeded to and was building and constructing a ditch and embankment along the north line of his premises herein described in such a manner as to turn all the water arising from 'Spring Branch' away from its natural course and direction, which was over and across the defendant's premises, and precipitated said waters in and upon the premises of the plaintiff herein mentioned, to the great damage and injury of the plaintiff; that the district court of Nemaha county, Nebraska, did,

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on the 2d day of September, A.D. 1882, grant and allow a temporary order of injunction, by which said order of injunction the defendant was restrained from further pursuing the building and completing of the said ditch and said embankment until such time as a final hearing on the petition praying said order of injunction might be had; that by the mutual agreement of the plaintiff and defendant in this action, they being plaintiff and defendant in the injunction proceeding begun in September, 1882, in this court, as well as by the judgment and consideration of the district court of this county at the March term thereof, A.D. 1883, the said temporary order of injunction was made final, perpetual, and mandatory, and said defendant was enjoined and restrained from further making of any ditch and embankment, such as was described in the petition in that cause, and the said defendant agreed to and was required by the said order to make three clear, clean openings in the said embankment, which was then erected and completed, each of said openings to be at least one rod wide, and said openings located as follows: one opposite and just south of the south-west corner of the plaintiff's said land mentioned in the petition in that cause, which is the same land above mentioned as having been owned by plaintiff; and one such opening to be ten rods west of the said south-west corner of said plaintiff's land, and the third said opening to be forty rods east of the said south-west corner of said plaintiff's land, and said defendant was to have the right to build ditches on his own land in the said locality, of sufficient dimensions to gather and back water towards the 'Muddy' creek, said ditches to be free from embankments, and the said three openings and ditches were ordered to be made and completed within thirty days from the date of said order and stipulation; that the said order and stipulation was dated the twentieth day of March, A.D. 1883; that the defendant wholly disregarded and in each and every par-

ticular disobeyed and violated the said stipulation and order of injunction so made perpetual by the judgment and consideration of the district court of Nemaha county, by failing, neglecting, and refusing to make the said three openings at the time required by the said order of injunction, and by continuing and completing the said ditches with embankments; that information, charging the defendant with the violation of the said injunction, having been filed in the district court of said county, the said defendant was by the judgment and consideration of the said district court at the April term thereof, A.D. 1885, upon a full hearing of all the allegations and proofs, the defendant being in court in person and by counsel, adjudged guilty of contempt of court for his violation of the said order of injunction, and was required to enter into further security for his faithful observance of the injunction; that in consequence of the failure of the defendant to obey the said injunction, and by his failure and refusal to make said three openings in said embankment at the time specified in the said order of injunction, and in consequence of his building and completing the said ditches with embankments contrary to the said order of injunction, the west eighty acres of the plaintiff's land, mentioned in this petition, was overflowed and a large body of water was backed onto the said eighty acres and there remained for about the space of fifteen days, which said wrongs and injuries occurred in the month of June, 1884, and thereby and in consequence of the said overflow fifty acres of growing corn of the said west eighty acres were wholly ruined and destroyed, and plaintiff's premises were greatly injured and damaged; that by reason of and in consequence of the said overflow complained of above, plaintiff suffered the loss and total destruction of twelve tons of good and merchantable hay stacked on the said premises.

"Plaintiff has suffered damages in the sum of one thousand dollars, no part of which has ever been paid; plaintiff therefore prays judgment against the defendant for the

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sum of one thousand dollars, together with costs of suit and for such other and further relief as justice and equity may require."

The answer is a general denial.

On the trial of the cause to a jury the following stipulation was introduced in evidence: "The said parties stipulate and agree that injunction as prayed against defendant's making any embankment such as is described in the petition be made perpetual, with a mandatory order that defendant shall make three clear and clean openings in the said embankment which he has already erected in the premises, each of said openings to be one rod wide, and shall be located as follows: one opposite and just south of the south-west corner of plaintiff's land, described in the petition, and one such opening shall be ten rods west of said south-west corner of plaintiff's said premises, and the third said opening shall be forty rods east of said south-west corner of plaintiff's said premises.

"And defendant shall have the right to make ditches on his own land, free and clear of embankments, [that will gather and back water] towards the Muddy to the extent of his line, and plaintiff will furnish right of way from defendant's line to extend such ditch to the Muddy free of charge. The ditch from defendant's east line eastward to the Muddy shall be made by the defendant to correspond in size and depth with the ditch west of there.

"The said three openings in embankment and said ditch shall all be made by defendant within one month from this date. Plaintiff shall pay the defendant ten dollars, and defendant shall pay all costs herein.

"Judgment, decree, and order shall be entered according to this agreement.

"March 20th, 1883.

"RUDOLPH SCHNEIDER,

"By J. H. Broady, Att'y.

"R. A. STEWART,

"By R. G. Wilkinson, Agt. and Att'y."

It appears that a decree was entered in that case in conformity to the above stipulation. The testimony covers 114 pages, and the substance of it is contained in that of the witnesses, Carnes and Stewart. A. Carnes, a witness called by the plaintiff below, testified in substance as follows :

"Lived seventeen years within one and one-fourth miles of premises; plaintiff is my son-in-law; know the ditch, which is about half a mile long; plaintiff's west $\frac{1}{2}$ of north-east $\frac{1}{4}$, 19-4-14, is north of the ditch, and Stewart and Kleckner's land south; all the parties were resident occupiers in 1884. The ditch is about eight feet wide until it gets to Mr. Kleckner's corner. On March 20, 1883, about fifty or sixty rods of embankment was thrown up on south side of ditch, running perhaps fifty rods east of Schneider's south-west corner. On March 23 or 24, 1884, I went along the whole ditch, and there appeared to be a dense embankment; a ditch due south from the end of the east line of Schneider's west eighty, with north end filled up, and a continuous embankment from there to the bluffs, and the water there was fifteen inches more on Schneider's land, where he lost his corn crop by reason of the water striking the embankment, except in a few places where it seeped through, than it was on Stewart's. Part of the ditch was constructed east of Schneider's south-west corner, and a part west at the time of the injunction. The ditch constructed west, after the injunction, to the bluffs, averaged eight feet (in some places it might have been ten feet) and fifteen inches deep; and the eastern part on to the Muddy, where it was perhaps all on Schneider's land, some dirt was thrown out on the north side, but the heaviest portion on the south side; depth of about six inches, until it empties; there was a considerable washout on the Muddy.

"The defendant told me he made that ditch shortly after high water in March, 1884. At the Muddy the ground is

higher than at the west, and needed no embankment to back the water; but where there was an embankment on that east part it would not be more than four inches average, and the height, width, and depth of the ditch are smaller than the eastern part, generally. The embankment raised to the bluffs after the injunction about corresponds with the embankment built before the injunction, the ditch in some places being about ten feet wide, and from a foot to (in one place) twenty-two inches before water could get over the embankment. In the latter part of June, 1884, I saw the water on Schneider's corn field, and it had more the appearance of a lake than a corn field, for some time, so that further tillage was impossible, and forty to forty-five acres was destroyed, the reason of the overflow being that Bennett's and Spring branch, instead of going in their natural course—south-east—were thrown by the embankment back over the land as I saw it. And so it will continue while these things remain, while (since the embankment) I never saw much water on the land south of it. The corn crop was good up to the overflow; after, it looked scalded and not worth cultivating; and I saw it after it was matured and would not have gathered the crop for it. Am a farmer but prefer not to state the value of that crop just before the overflow."

On cross-examination, he testified:

"When Stewart was stopped by the injunction, I don't think he had got as far east as Kleckner's ditch. The mouth of Spring branch is about twenty rods north of the ditch, and before the embankment the flow was eight to ten rods west of the corner, and the other (Bennett's) water passed on ten or twelve acres of grass land west of the farming land, in its course south-east, and then off onto Stewart's land and run south-east on Schneider's W. line. Where Bennett's water struck the grass land there was once fifteen or twenty rods of ditch, which Schneider cut one or two spades wide, but don't think that ditch was

brought within a rod of the other ditch. I think it stopped two or three rods back—I cannot state. It now enters Stewart's ditch. That ditch was dug to turn the water south, where it struck the grass, and it would pass Stewart's anyway. Schneider's ditch was east of the flow of Spring branch. Where Spring branch comes on the Muddy, the bottom land it is nearly level, with grass and weeds in the old channel, and may be now, since Stewart's ditch, black weeds near to the center of the corn field, and may be also pools. The strip of grass on Schneider's south-west corner is the lowest of his land. For the last seventeen years there has never been a duck pond in the center of Schneider's corn ground, and water did not stand there before the ditch was made. It is higher on the Muddy than west. The land was first broken in 1873, and Schneider raised crops from 1875 to 1884, there being one entire failure in 1883, when the overflow of the Muddy took all the crops in the bottom. A part of first crop (wheat) in 1875 was lost. I have not known an entire failure till the embankment, when a crop was planted. About March 20 or 24, 1884, I went to examine the embankment, because fifty acres of Schneider's land was overflowed to a depth of one foot to fifteen inches. I went to see the situation, and not for the purpose of a lawsuit, and I have no money interest in this suit. I was there about the latter part of June, 1884, and at other times. When I saw it on March 24, 1884, the embankment began at Kleckner's corner, and was continuous west. It was extended continuously to the bluffs since the injunction. The temporary injunction was served after harvest, 1882. I saw the first embankment in the fall of 1883, and also saw it when partly constructed in the fore part of the season. From Stewart's east line to the Muddy, in March, 1885, the ditch was narrow and shallow, with not capacity to carry one-tenth of Spring branch, and more dirt is thrown out south and north, but that ditch would not make a high embankment. I described

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that ditch as six inches deep, but it gets deeper west. At the west, a part of the water used to run over Schneider's land, and there were several places where water could stand in winter, but it dried or run off at the time the other land was ready for the plow. The ditch does not carry off the water; it backs on a portion of Schneider's field.

"It is not the fact that there is a strip of grass land north of the ditch higher than the ditch. I saw the ditch between March 20 and 24, 1884, measured eight feet wide at many places west of Kleckner's corner, but did not measure it myself. From the time the injunction was made perpetual till March, 1884, I did not go to the ditch and embankment to examine them. I thought the matter settled. I cannot state the situation in March, 1883. In 1884 there were heavy rains, the Muddy did not overflow, and the flow I speak of came from Spring branch and the place above. The ditch was highest at the north so the water could not pass."

One Dawson, a surveyor, testified that he had taken levels of the ditch and embankment, and that an obstruction at the ditch embankment which would raise the water six inches would cause it to flow back on the land of the plaintiff below from 300 to 500 feet. He also produced a plat made by himself from his surveys.

R. A. Stewart, the defendant below, testified, in substance: "Under the stipulation and injunction I had to open the ditch from Kleckner's corner, and to make three openings, each a rod wide—one ten rods west of Schneider's south-west corner, two immediately south of the corner, and three forty rods east of that corner. This was March 20th, 1883, and I took men, plow, and scrapers, and finished the work in twenty-one or twenty-two days. I measured each of the openings a rod wide, cutting them down and clearing them out to the sod, and they have always been open since that time. In the spring of 1882, Schneider constructed a ditch, starting from the south-west corner and

running north of his line about forty rods, building an embankment with sod, fence fashion, on the east side of the ditch. I saw that ditch would throw the water out of this big hollow on my hay land, instead of spreading in its natural course over the bottom, and, to prevent that, in September following, I commenced a ditch on my north line that, with the consent of Kleckner, would carry the water into his ditch, and thence into one I had further south, and so into the Muddy. I would have made that ditch as large again as I did, but Schneider would not join in the expense. I meant to have carried that ditch to the bluffs, with an embankment to carry the water off my hay ground, but I was stopped by an injunction eighty rods from Kleckner's corner. When the work was resumed, after the stipulation and decree, in place of making a ditch on to the bluffs, which the injunction did not allow, I made a wide fire-break, to keep fire from the bottom, by scraping the sod and throwing it off on each side. From Kleckner's corner east to the Muddy, we made the ditch so as to take the flow to the creek; near Kleckner's corner not going so deep, because there was a depression of the ground there, and at the high land at the Muddy, where the ditch emptied, sinking deeper, so as to get the flow, making it a foot deeper than the stipulation required. The first rain in the spring might bring enough water to fill the ditch. The ditch kept the water in when it was not full, and then the first rain that came it flowed along lively, and in two or three weeks at the Muddy bank it had excavated a rod wide, and eight or nine feet deeper than I dug it. This work was made mandatory on me at the instance of Schneider, and he paid \$10 towards it. By agreement with Kleckner, I stopped the mouth of his ditch to prevent a flow of water on his land, and so that it would run on to the Muddy. On Schneider's land there had been at least one large slough, or pond, where the water stood till summer evaporation, and since the

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ditch no water stays, but he sues me for destroying his goose hunting ground. The south-west part of Schneider's land, where he claims his crop was destroyed, is like mine in that neighborhood, low and swampy, and little value except drained, except in a very dry year, of which we have not had very many lately. It is impossible for that ditch, as it has been since 1883, to back water on Schneider's, for, as the embankment has been, you might as well try to make a seive hold water as that. The cause of the destruction of his crop in 1884 was heavy rains. I have kept record over twenty years, and that year from June to July 31, there was forty-one days the ground in the bottom was wet from the surface, so that a man there working would sink ankle deep. Other crops besides his were as good as destroyed by overflow, some of mine included, that were on higher ground. The strip of grass land north of the ditch is 15 rods wide and 122 rods long, more or less. In the flood of 1883 the plowed land north washed, and quite large quantities of mud were permanently deposited on the grass land, and some washed south of me. That grass land used to be his lowest land, but after the wash it became highest, and water on the plowed land would have to rise six inches before it got over the grass land so as to run to the creek. I examined that grass land and I saw two old stacks of hay with the tops settled in, which was worthless. In 1885 I lost seventy tons of hay by letting it get that way. Taking his corn crop as it has been described, and at the time named, and to take the chance of its coming to anything on that land, I would put its value at \$3 an acre. In the fall of 1883 Schneider expressed himself satisfied with the ditch I had made, but I said we ought to have joined together and cut a big wide opening for the freshets. He did nothing to the ditch to prevent that crop being destroyed after he put it in. At a time the ditch would not carry all the water, and the overflow would go on my land and into my ditch,

south; but the greater part of the time the ditch carried the water to the Muddy creek. I am satisfied water never, during that time, stood on his grass strip twelve hours, and north of that I think not as many days as he claims in his petition. *Cross-examined:* In the spring of 1884, in Rich's implement house, at Auburn, I did not tell Schneider I had done all I could to the ditch, and if he tried anything I was worth enough to break him up. He threatened to sue, and have me imprisoned, and I said to him if he would show me what he wanted I would do anything to keep out of court. He said I had stopped the openings, and I told him I had not. There was no embankment of the part towards the bluffs. From Schneider's south-west corner I complied with the settlement. The ditch will carry all the water it will hold west of it, but it is not large enough to hold all the water that comes to it sometimes, and the stipulation did not require that. I have done more than the stipulation required in getting the water to the Muddy. Where the depression was I leveled the ditch by the bottom and not the surface, and made the ditch deep enough to carry as much east as west. I made a nice job. I know that Schneider's grass land is higher than his plowed land, for I have been there many times along the ditch every spring and summer since I made it, and in 1884 I saw water on the plowed ground when there was none on the grass. After the flood I did not make a ditch out of the fire-break. That was only plowed and scraped once, and the loose clods scattered over my land."

The testimony of the other witnesses tends to corroborate that of Carnes and Stewart. The jury returned a verdict in favor of the plaintiff below for the sum of \$275, upon which judgment was rendered. The first objection made in this court is, that the verdict is not sustained by the evidence. This objection, however, is unavailing, as the testimony is nearly equally balanced and

the case is one proper to submit to the jury to determine the facts.

Second. Objections are made to the following instructions given by the court :

"1. You are instructed that if you believe from the evidence that the plaintiff and defendant entered into the stipulation, and a decree or order of injunction was rendered thereon, which have been introduced in evidence, and if you further find from the evidence that the defendant violated the terms of said stipulation and decree, or order of injunction, as alleged in petition, and in consequence of such violation the plaintiff has been damaged as in the petition alleged, then you will find for the plaintiff.

"2. You are instructed that if you believe from the evidence that the waters in the vicinity of the plaintiff's lands, in the time of high water, collect near and overflow plaintiff's land, or a portion thereof, this will not prevent the plaintiff from recovering damages from the defendant. If you further find from the evidence that plaintiff and defendant entered into a stipulation for a decree of injunction, as claimed in the petition ; and if you also believe that defendant violated said stipulation and order of injunction, as claimed in the petition, and that in consequence of such violation a larger volume of water was forced over on plaintiff's grounds, or that a larger portion of plaintiff's land was overflowed, or that said water was held there for a longer time as the result of said violation ; if you believe from the evidence there was such a violation, and that plaintiff's crops were injured to a greater extent than they would have been from the natural overflow, you should find for the plaintiff. And if you do so find, then the measure of damages is the difference in amount between the damage he sustained from the natural overflow, and the amount of damage caused by the increased overflow of his land. If you find there was such increased overflow, and in your verdict you should endeavor to repair the actual loss, if

you find the plaintiff has sustained damages as claimed in his petition.

"3. If you find for the plaintiff, his measure of recovery will be the actual injury to plaintiff's corn crop and hay at the time and place they were damaged; if you find from the evidence they were damaged in consequence of the violation of said stipulation and decree by defendant, as shown by the evidence."

These instructions conform to the testimony in the case, and there was no error in giving the same.

The defendant below asked the following instructions which were refused:

"1. The jury are further instructed that unless you find from the evidence that there has been a violation on the part of the defendant of the order and decree of injunction mentioned in plaintiff's petition, this plaintiff cannot recover for water backed upon the lands of plaintiff by the embankment of said ditch, unless you find that said water so diverted was a living stream or water-course; and unless you so find from the evidence that said embankment has diverted and thrown back upon the lands of this plaintiff the waters of a living stream or water-course, you will find for the defendant.

"2. The jury are instructed that if you should find from the preponderance of the evidence that the plaintiff is entitled to damages, as claimed in his petition, on the account of the loss of his crop, then in that case you will, in ascertaining the amount of such damage so sustained by the plaintiff, be confined to the value of said crop of corn just as it stood on the ground immediately prior to the time it was alleged to have been destroyed, without any regard to its prospective value at any time thereafter.

"3. The jury are instructed that, in order to entitle the plaintiff to recover in this action, it must appear from the evidence that the plaintiff has used due diligence and caution in order to protect his crop from damage arising from

the injury complained of, and unless you find he has exercised ordinary care and diligence to protect said crop from injury on account of the water being backed up on it, and held there by said embankment complained of, you will find for the defendant.

"4. The jury are instructed that the plaintiff has the right to rely on the stipulation and the judgment rendered thereon, and if you find from the evidence that defendant has not complied with the requirements of said stipulation and judgment, and the plaintiff has been damaged on account of said defendant not complying with said stipulation and judgment, then you will find for the plaintiff and assess his damages at the amount he has sustained on account of said violation."

These instructions were properly refused, as such portions of them as had not previously been given were not applicable to the testimony.

The case is one proper to submit to a jury to determine from the conflicting testimony whether or not the plaintiff in error had constructed the embankment complained of without the openings required, and thereby caused the water of Spring branch to flow back upon the land of defendant in error, and destroy the crop in controversy. That the crop was destroyed all the testimony tends to show, and in our view a preponderance of the testimony sustains the verdict that the cause of the injury was the embankment erected by the plaintiff in error.

There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

WILLIAM J. CONNELL, PLAINTIFF IN ERROR, V. WILLIAM G. CHAMBERS, DEFENDANT IN ERROR.

Landlord and Tenant: NOTICE TO QUIT. In an action of unlawful detainer, by a landlord against a tenant, for holding over demised premises after the termination of his lease, a notice to quit, dated and served on the tenant thirteen days or more before the termination of the lease, and while it was in full force and effect, by the terms of which notice the tenant was required to quit, surrender, and deliver up the possession of the premises forthwith; *Held*, Insufficient.

ERROR to the district court for Douglas county. Tried below before WAKELEY, J.

C. A. Baldwin and *William J. Connell*, for plaintiff in error,

The date fixed in the notice must correspond with the termination of the lease. *Wade on Notice*, Secs. 583-610. *Waters v. Young*, 11 Rhode Island, 1. *Steward v. Harding*, 2 Gray, 335. *Boynton v. Bodwell*, 113 Mass., 531.

James W. Savage, for defendant in error, cited: *Hawley v. Robeson*, 14 Neb., 435.

COBB, J.

This action was commenced before the county judge of Douglas county, where the defendant in error, plaintiff there, obtained a judgment. Thereupon it was taken to the district court on error. The judgment of the county judge being reversed for error in the proceedings, the cause was retained for trial in the district court under the provisions of section 601 of the civil code. The cause was placed upon the docket among the issues of fact for trial at the September term, 1886, and assigned for trial to the 27th day of September. On that day the cause was

duly reached, and called for trial in its regular order by the court, and upon oral objection being made by the defendant in error to the trial of said cause, at such time, a demand was made both orally and in writing by the plaintiff in error for a trial of the cause, which demand was overruled. Said cause was passed, and other causes assigned for subsequent dates were taken up and tried. Thereafter, on the 14th day of October following, the said court made an order requiring the plaintiff in error to show cause why said action should not be set down for trial, and tried on the 18th day of said month. Cause was shown pursuant to such order, which was overruled by the court, and the cause set down for trial, and tried accordingly. These rulings of the court are assigned as error.

Upon the trial of this cause to a jury the defendant in error introduced in evidence a lease of certain premises in the city of Omaha, executed by Caroline J. Chambers to Fritz Riepen, bearing date the 18th day of April, 1879, whereby she leased said premises to the said Fritz Riepen for the term of five years, from the 1st day of May, 1879, to the 1st day of May, 1884. Also a deed of assignment of the said lease, executed by the said Fritz Riepen to James H. Smith as collateral security for the payment of eight hundred dollars, etc., and a deed of assignment of the said lease by James H. Smith to the plaintiff in error, W. J. Connell. There was also evidence tending to prove that plaintiff in error, W. J. Connell, entered into possession under said lease, and, through his tenants and sublessees, was in possession of said lot at the date of the commencement of the action.

The defendant in error also offered in evidence a notice, of which the following is a copy :

“NOTICE.

“To and all others whom it may concern :

“You are hereby notified forthwith to leave the premises now occupied by you, and described as follows, to-wit :

Lot one (1) in block one hundred and one (101), with the appurtenances thereon, in the city of Omaha, county of Douglas, and state of Nebraska, and deliver the possession of the same to the undersigned. Dated, Omaha, Nebraska, April 17th, 1884.

"Signed,

W. G. CHAMBERS."

There was evidence that this notice was served on the plaintiff in error, W. J. Connell, on the 10th (?) day of April, 1884. There was also parol evidence that at the expiration of the term according to the above lease the defendant in error had become the owner of the said premises. The above notice was admitted in evidence over the objection of the defendant (plaintiff in error).

The court instructed the jury that if they believed the testimony given upon the trial to be true, it would be their duty to find for the plaintiff (defendant in error), and against the defendant (plaintiff in error).

There was a verdict and judgment for the defendant in error.

The defendant below, W. J. Connell, brings the cause to this court on error and assigns the following errors, to-wit:

"1. The court erred in sustaining the motion and request of the plaintiff for a postponement of the trial until a future day of the term from the day on which the case was set down by the court for trial, and for that purpose placed upon the list of causes assigned for trial on a day certain, the defendant objecting to such postponement and demanding a trial on the day fixed by the court.

"2. The court having ordered the defendant to show cause why said cause should not be proceeded with and tried without further delay, the court erred in holding that the cause shown by the defendant was insufficient, and ordering that the trial of the cause should proceed on Monday, October, 18th, 1886.

"3. The court erred in compelling the defendants to proceed with the trial of the cause on Monday, October 18th, 1886, against their objections and cause shown.

"4. The court erred in permitting certain papers purporting to be notices in the case, to go to the jury as evidence against the objections and exceptions of the defendant.

"5. The court erred in permitting the plaintiff under the complaint to give evidence to the jury of any failure on the part of the defendant to pay rent.

"6. The court erred in the instruction given to the jury. The court should have instructed the jury that in no event could they find the defendant guilty under the evidence. The verdict is contrary to the law and the evidence in the case.

"7. The verdict should have been, under the evidence and the law, not guilty."

The first, second, and third errors assigned relate to the action of the district court in passing the cause when it was regularly reached for trial, and setting it down for trial on a subsequent day of the term, instead of trying it on the day of its assignment, or continuing it for the term, or placing it at the foot of the docket, as is required by the letter of the statute. Code, sec. 329.

We are all of the opinion that this provision of the statute is directory only, and that it was not the intention of the legislature to deprive the court in the exercise of its discretion to pass a cause when reached for trial, or to set the same down for trial on a future day of the term. Such seems to have been the universal construction placed upon the statute and the practice under it, during the many years that it remained upon the statute book, and even were it susceptible of a more rigid construction, now that it has been modified by the legislature it would be deemed unprofitable to disturb it.

The fourth error assigned relates to the notice. Section

1022 of the code provides that : "It shall be the duty of the party desiring to commence an action under this chapter, to notify the adverse party to leave the premises, for the possession of which the action is about to be brought, which notice shall be served at least three days before commencing the action, by leaving a written copy with the defendant, or at his usual place of abode, if he cannot be found."

As we have already seen, the plaintiff in error held the premises in question by virtue of a written lease, executed to run five years from a day certain. Having gone into possession under the said lease, his holding of the premises must be held to have been under it, and not otherwise, during the whole time that said lease had to run ; at the expiration of which time his possession became unlawful unless the landlord chose to treat him as a tenant at will.

Nearly or quite all the cases cited by counsel in the briefs, or to which the attention of the court was called at the argument, are where the tenancy was one at will or by sufferance, or had become such by the act or acquiescence of the landlord. Not one of them presents a case like the one at bar, where the landlord seeks to dispossess the tenant promptly at the termination of a term created by a written lease. They therefore shed no direct light upon the point which must be met here, which is as to the sufficiency of the notice above set out, as a condition precedent to the maintaining of a summary action of unlawful detention under the section of the statute above copied.

The case of *Benfey v. Congdon*, 40 Mich., 283, was much like the case at bar. In deciding that case, Judge Cooley says : "It is claimed by Benfey that when the year was up and he still remained in possession, he was entitled to the statutory notice, as a tenant at will or at sufferance. Comp. L., 4304. No doubt he would have been entitled to it as a tenant at will had he held over by the express or implied consent of Congdon, but not otherwise." Upon

referring to section 4,304, Comp. L. of Michigan, it is seen that the notice referred to by Judge Cooley as "statutory" is the three months notice provided for in said section, upon which "all estates at will or by sufferance may be determined by either party." Upon referring to Chap. 211, Comp. L. of Michigan, which is analagous to our forcible entry and detention act, I find that no notice is required by any of its provisions.

In considering the object and purposes, then, of the notice required by the provisions of our statute, we cannot consider it to be to determine or terminate the estate or right of possession of the tenant, for that purpose is amply provided for by the terms of his lease. And yet the statute requires notice to be given him as a condition precedent to the commencement of summary proceedings against him, such as the case which we are now reviewing. As to the date of such notice or the time of service, whether before or after the expiration of the term, that question was fully passed upon by this court in the case of *Hawley v. Robeson*, 14 Neb., 435. Following the case of *Leutzey v. Herchelrode*, 20 O. S., 334, we held that the notice might be served on the tenant before the end of his term, and while his lease was in full force. But no question as to the contents of the notice arose in that case.

In the case at bar the notice was dated the 17th day of April, and while the testimony is that it was served on the 10th day of that month, an impossible date, we must presume that it was served on the day of its date. It demanded the delivery of the possession of the premises "forthwith." No cause or ground is stated in the notice for the demand of possession. Had the demand been for the delivery of the possession on or after the day of the expiration of the term, it might be presumed that it was based upon the expiration of the lease, or the term created thereby, but no such presumption can attach to a demand of possession forthwith made thirteen days before such ex-

piration. While the statute is silent as to the contents of the notice, I think it should be such as to apprise the tenant, at least in a general way, of the grounds of the claim of the landlord to the possession demanded, and especially when the ground or purpose of such demand may not be indicated by the time when such possession is to be delivered by the terms of the demand.

Although, as we have seen, there was no tenancy at will or by sufferance existing between the parties, either at the time of the service of the notice or of the commencement of the action, and consequently no necessity for the service of a notice to terminate such tenancy, yet there is an analogy between a notice for that purpose and the notice required by statute in cases of unlawful detention, and we may derive some light from the cases where notices for the former purpose have been considered.

In the case of *Seward v. Harding*, 2 Gray, 335, the notice was in the following words: "Plymouth, August 16, 1853. To Caleb Harding. You are hereby notified to quit the premises by you now occupied and belonging to me, situated on Sumner street, Plymouth. This notice is given for the purpose of terminating your tenancy of the premises." The trial court held the notice insufficient and ordered a nonsuit. On appeal, C. J. Shaw, in the opinion, said: "This court concurs with the judge of the court of common pleas in holding that the notice to quit was insufficient. The notice not only fixes no day on which the tenant was to quit, but none was indicated by general terms or by reference to the end of the next ensuing quarter."

The case of *Currier v. Barker* is reported in the same volume at p. 224. The form of the notice in that was as follows: "Date. To John I. Barker. You being in possession of a long wooden building, called a bowling alley, situated and being near the Neck Tavern, so called, in the city of Charleston aforesaid, are hereby notified to quit and deliver up to us the premises aforesaid. Hereof fail

not, or we shall take a due course of law to eject you from the same. Signed, Currier & Dalton." This notice was held sufficient by the trial court, but the chief justice, in sustaining the defendant's exceptions, for the court, said: "We are of the opinion that the notice is bad and insufficient. * * * That it fixes no time, expressly or by any description, for the tenant to quit. The notice in terms was to quit and deliver up the premises, fixing no time by naming a day or otherwise, and therefore operated as a demand to quit and deliver up the same forthwith, and is not distinguishable from the cases heretofore decided."

The other cases cited by counsel for plaintiff in error, as well as the citation from Taylor, are to the same effect.

In order to give any effect to the statute requiring notice to be given before the commencement of summary proceedings against a tenant holding over after the termination of his lease, we must hold that such notice must, either in direct terms, or by clear and unmistakable implication, point out a day upon which the tenant is required to quit, which day must be at or after the termination of the lease.

It therefore necessarily follows that the district court erred in admitting the notice in evidence to the jury and in the instruction given.

The judgment of the district court is reversed, and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

D. KEELER, PLAINTIFF IN ERROR, V. GEORGE W.
ELSTON, DEFENDANT IN ERROR.

1. **Jurisdiction: FOREIGN JUDGMENT.** The judgment of a state court duly authenticated as prescribed by law, where there is jurisdiction, is conclusive as an adjudication upon the subject-matter of the suit.
2. ———: ———: **FRAUD.** But fraud perpetrated in securing such judgment, and by which it was obtained, would be a good defense to an action thereon if properly pleaded in the answer, and the decision of an inferior court overruling a demurrer thereto will be affirmed.

ERROR to the district court for Platte county. Tried below before POST, J.

McAllister Brothers, for plaintiff in error.

1. This judgment cannot be attacked in a collateral proceeding. *Millard v. Marmon*, 7 N. E. Rep., 468. *Willis v. Bayles*, 5 N. E. Rep., 8. *Lawrey v. Howard*, 3 N. E. Rep., 124. *Bryant v. Estabrook*, 16 Neb., 217. *Pettiford v. Zoellner*, 8 N. W. Rep., 57. *Hall v. Durham*, 9 N. E. Rep., 926. A judgment can only be thus attacked for want of jurisdiction.

2. Fraud is no defense to an action on a judgment of a sister state. *Mills v. Duryee*, 7 Cranch, 481. *Christmas v. Russell*, 5 Wallace, 291. *Rea v. Hulbert*, 17 Ill., 572. *Union Trust Co. v. Rochester & P. Ry. Co.*, 29 Federal Rep., 609. 28 Id., 36.

George G. Bowman, for defendant in error, cited: *Dobson v. Pearce*, 12 N. Y., 156. *Davis v. Headley*, 22 N. J. Eq., 115. *Doughty v. Doughty*, 27 Id., 315.

REESE, J.

This action was originally commenced in the county court of Platte county. It was founded upon a judgment

rendered in favor of plaintiff and against defendant by the district court of Dodge county, Minnesota, in an action then pending between the parties.

In the second count of defendant's answer filed in the county court, it is alleged as a defense that the judgment of the Minnesota court was obtained by fraud, that the action was founded upon a promissory note which had been paid. It is averred that the action was commenced and service had upon defendant while he was temporarily visiting that state, but that after service of process he called the attention of plaintiff to the fact of payment previously made and the circumstances accompanying such payment, whereupon plaintiff admitted the payment, and upon investigation he was satisfied that he had no cause of action against defendant. That plaintiff then promised and agreed "to go at once and dismiss said action, and that he would not further prosecute the same, and that defendant need not employ an attorney nor pay any further attention to it. Thereupon defendant, relying upon such promise and agreement, and believing that said action would be dismissed at once by said plaintiff" returned to his home in Nebraska, and failed to appear and defend said action. "That plaintiff in violation of his promise and agreement did not dismiss the action, but fraudulently and without the knowledge of defendant procured the rendition of the judgment." Plaintiff demurred to this count of the answer, as not stating a defense. The county court overruled the demurrer, and plaintiff refusing to plead further, the cause was dismissed. The cause was then removed to the district court by proceedings in error, where the judgment of the county court was affirmed. For the purpose of obtaining a review of that judgment, plaintiff prosecutes error here.

As is shown by the foregoing, the only question presented is, can a judgment be successfully attacked in this collateral way, upon the ground that it was obtained by

the fraudulent acts of plaintiff? So far as its effects upon the judgment are concerned, there is a wide difference between fraud, which may be a defense to the action in the first instance, and fraud practiced in procuring the judgment. The well-established doctrine that fraud vitiates everything into which it enters, may as well be applied to a judgment as to a contract, provided the fraudulent act is so connected with obtaining the judgment as to enter into it or form the basis upon which it stands, and by which it was procured. If it can be applied only to the cause of action, then the rendition of the judgment, where there is jurisdiction of the person of the defendant, is an adjudication thereon, and must have the same effect as an adjudication upon any other defense which might be pleaded. But such is not the case where the fraudulent act is alleged to be in procuring the judgment without any reference to the defenses which might be pleaded in the formation of the issues prior to trial.

This question was before this court and discussed in *Eaton v. Hasty*, 6 Neb., 419, and was decided adversely to plaintiff in error. In that case, after referring to *Fermor's Case*, 3 Coke, 77; *Hoitt v. Holcomb*, 3 Foster, 554; *Burden v. Fitch*, 15 John., 145; *Lawrence v. Jarvis*, 32 Ill., 310; *Shelton v. Tiffin*, 6 Howard, 186, in referring to the provisions of the act of congress of May 26, 1790, which provides that full faith and credit shall be given to judgments, judicial records, etc., Judge Gantt, in writing the opinion, says that the rule seems to be well settled that the judgment of a state court authenticated as required by law "is conclusive upon the merits or subject-matter of the suit; but that does not exclude such defenses as inquire into the jurisdiction of the court in which it was pronounced * * * or to plead as a defense to an action upon such judgment, a release, payment, or limitation by common law prescription, or statute, or fraud in obtaining the judgment." See also *Holt v. Alloway*, 2 Blackf., 108.

A number of authorities might be cited sustaining this view, but as we are entirely satisfied with the holding in the foregoing case, we will adhere to it without discussing the authorities cited by plaintiff in error.

As the allegations of the answer presented facts sufficient to constitute a defense to the action, the decision of the county court in overruling the demurrer, and that of the district court in affirming the judgment, were correct. The judgment of the district court in dismissing the petition in error is affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

STATE OF NEBRASKA, EX REL. BOARD OF TRANSPORTATION, V. THE FREMONT, ELKHORN & MISSOURI VALLEY R. R. COMPANY.

23	313
23	118
22	313
51	37
56	632
22	313
159	376
159	747

1. **State: DUTIES OF ATTORNEY GENERAL.** The attorney general is the law officer of the state, and is required to prosecute or defend any case in the supreme court in which the state is a party or interested; therefore, where a majority of the board of transportation of the state adopted a resolution asking the supreme court to continue a case pending therein against a railroad company to compel such company to conform its rates and charges to an order previously made by said board, *Held*, That the board had no authority to control the action of the attorney general in the management of the case.
2. **Mandamus: DEMURRER TO ALTERNATIVE WRIT.** Where a railway company demurred to an alternative writ requiring it to reduce its rates and charges to conform to an order of the board of transportation, and denied the power of the board to reduce such rates and charges, *Held*, That the court would determine the question of the power of the board to make the order in question before entering upon an examination of the facts, and therefore would not permit the demurrer to be withdrawn.

3. **Railroads: POWER OF STATE BOARD.** The act to regulate railroads and to prevent unjust discrimination, approved March 31, 1887, provides that all charges made for services rendered, or to be rendered, by any railway company in this state, in the transportation of passengers or property, shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful; and requires such railway company to print and keep for public inspection schedules showing the rates and fares and charges which have been established and are in force at the time upon such railroad. *Held*, That the board of transportation has authority to determine, in the first instance, what are just and reasonable charges for the services rendered or to be rendered on such railways.
4. ———: ———. The act in question prohibits any preference or advantage to any particular person, company, corporation, or locality on any particular description of traffic in any respect, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any prejudice or disadvantage in any respect, and places the general supervision of all railroads within the state in the board of transportation, and requires it carefully to investigate any complaints made in writing, and under oath, concerning any unjust discrimination against any person, firm, corporation, or locality, either in rates or facilities furnished, in order to prevent unjust discriminations against either persons or places.
5. ———: ———. The word "locality," mentioned in the statute, means the territory unjustly discriminated against, and may be a village, city, county, or portion of the state.
6. ———: ———. The power to determine what is an unjust rate and charge and the extent of the same, and to prevent unjust discrimination, carries with it the power to decide what is a just rate and charge, and authorizes the board to fix just and reasonable rates and charges.
7. ———: ———. The finding of fact by the board of transportation, in any matter submitted to it under the above statute for determination, is *prima facie* evidence of the existence of such facts and of the reasonableness of an order made by said board in pursuance thereof.
8. ———: ———. The act to regulate railroads, and prevent unjust discrimination, approved March 31, 1887, being a remedial statute, is to receive a liberal construction to carry into effect the purposes for which it was enacted.

9. ———: ———: JURISDICTION OF SUPREME COURT. Where the board of transportation has investigated charges of unjust discrimination against a railroad company, and has found such unjust discrimination to exist, and ordered such railroad company to reduce its rates to conform to a schedule presented by such board, which order the railroad company neglected to comply with, mandamus is a proper remedy to enforce such order, and the mention of the district court in the statute will not preclude bringing the action in the supreme court in any case where the latter court has original jurisdiction.

ORIGINAL application for mandamus. The case is stated in the opinion.

O. P. Mason, for relator.

The fact that the relators, by the terms of the statute, might make the application to the district court of the county or district where the road was operated, does not take away or interfere with the jurisdiction of this court, and the statute could not take away the jurisdiction of this court. The object of a mandamus is not to supersede legal remedies, but rather to supply a lack of them. Two prerequisites must exist to warrant a court in granting this remedy. *First*, It must appear that the relator has a clear legal right to the performance of the particular act or duty at the hands of the respondent; and *Second*, That the law affords no other adequate or specific remedy to secure the enforcement of the right and the performance of the duty it is sought to coerce. *People v. Supervisors of Greene*, 12 Barbour, 217. *Commonwealth v. Rosseter*, 2 Binn., 360. *Tarver v. Commissioner's Court*, 17 Ala., 527. *King v. Water Works Co.*, 6 Ad. and E., 355, per Coleridge, J.

The test to be applied in determining upon the right to relief by mandamus is to inquire whether the party aggrieved has a clear legal right, and whether he has any other adequate legal remedy, since the writ only belongs to those who have legal rights to enforce, and who find

themselves without an appropriate legal remedy. *People v. Thompson*, 25 Barb., 73. And in this sense it may be regarded as a dernier resort, to be used when the law affords no other adequate means of relief. *People v. Head*, 25 Ill., 325. And whenever the conditions above noticed co-exist, the right to the aid of a mandamus may be regarded as to that extent *ex debito justitiæ*. *People v. Hiliard*, 29 Ill., 418. It follows as a debt of justice, as a legal right. 3 Blackstone Com., 48. In this case the relators show not only a clear legal right to have the particular thing in question done, but also the right to have it done by the persons against whom the writ is sought. *People v. Mayor of Chicago*, 51 Ill., 28.

William Leese, Attorney General, for relator, cited the following authorities: *Railroad Commission v. Natchez, Jackson & Col. R. R.* 62 Miss., 646. *Id. v. Yazoo & Miss. Valley R. R.*, Id., 607. *Id. v. Farmers' Loan & Trust Co.*, 116 U. S., 307. *Id. v. Illinois Central R. Co.*, Id., 347. *Id. v. New Orleans & N. E. R. R.*, Id., 352. *Munn v. Illinois*, 94 U. S., 113. *Peik v. Chicago & N. W. R. R.*, Id., 164. *C., B. & Q. R. R. Co. v. Iowa*, Id., 155. *Chicago, Mil. & St. Paul v. Ackley*, Id., 179. *Winona & St. Peter R. R. Co. v. Blake*, Id., 180. Constitution of Nebraska, Sections 4 and 7, Art. II. *State, ex rel. Mattoon, v. R. V. R. R. Co.*, 18 Neb., 512.

G. M. Lambertson appeared on behalf of Board of Trade and Freight Bureau of city of Lincoln, made argument, but filed no brief.

John B. Hawley (T. M. Marquett also appearing), for respondent on power of board, cited: *Thatcher v. Fitchburg R. R. Co.*, 1 Interstate Com. Rep., 357. *In re Railway Conductors*, Id., 20. *Chicago, etc., R. R. Co. v. Iowa*, 94 U. S., 161. On remedy: *State v. School District*, 8

Neb., 94. *State v. Omaha*, 14 Id., 267. *State v. Eberhardt*, Id., 203. High Ex. Leg. Rem., Sec. 5.

MAXWELL, CH. J.

On the 24th day of September, 1887, the board of transportation of this state served notice upon the respondent, requiring it to reduce its freight charges $33\frac{1}{2}$ per cent on all its lines within the state of Nebraska, on or before October 1st, 1887, a schedule of the charges to be made as reduced for freight on said lines of road within the state being furnished to the respondent. The respondent neglected to comply with the order of the board, and on the 4th day of October, 1887, the board, through the attorney general of the state, applied for an alternative writ of mandamus to compel the respondent to comply with said order. The writ was returnable on the 5th of that month, when the respondent, by its attorney, appeared and prayed for additional time in which to plead to the writ, which time was granted. The respondent demurred to the complaint, and also to the alternative writ, and the case was set for hearing on the 17th day of October, 1887. On that date the attorney for the respondent not appearing, and the attorney general being absent at Washington on business pertaining to his office, the case was passed until his return. On his return, the case was set for hearing on the 31st day of October, 1887. At that date the attorney for the respondent appeared and filed a statement of an alleged compromise with the board of transportation of the state, except the attorney general, and also a resolution of said board, except said attorney general, asking the court to continue the case until the January term. This the attorney general resists, and insists that the case shall proceed, in order that the authority of the board over the subject-matter may be determined. The first question presented, therefore, is the authority of the

attorney general to proceed with the prosecution of the case against the protest of a majority of the board of transportation.

Section 1a of article V., chapter 83 of the Compiled Statutes, 1887, provides that, "The attorney general shall appear for the state, and prosecute and defend all actions and proceedings, civil or criminal, in the supreme court, in which the state shall be interested, or a party, and shall also, when requested by the governor, or either branch of the legislature, appear for the state, and prosecute and defend in any court, or before any officer, any cause or matter, civil or criminal, in which the state may be a party or interested." The attorney general is thus the law officer of the state, and intrusted by law with the management and control of all cases in which the state is a party or interested. The majority of the state board of transportation, therefore, cannot control his action in the premises, and the motion to continue the cause must be overruled.

2d. Upon the overruling of the motion for continuance, the attorney for the respondent asked leave to withdraw the demurrer, and for time in which to prepare and file an answer. This, however, cannot be permitted. The respondent denies the authority of the state board to regulate and control the rates of freight upon its lines of railway. The question of power is fully raised by the demurrer, and should be decided before entering upon the consideration of questions of fact. It is important, too, that if such power should be found to exist, that the question be determined, so that parties aggrieved may apply to the board for relief. The motion for leave to withdraw the demurrer and file an answer is therefore overruled. If, however, the court shall decide that the board of transportation has the power to regulate rates as contended for in the petition and alternative writ, the demurrer will be overruled, and upon proper application the defendant will have leave to answer.

3d. It is a matter of the public history of the state that for a number of years prior to the 31st day of March, 1887, it was generally claimed that some or all the railroads of the state had granted secret rebates to favorite shippers over their lines; that the effect of such rebates was to charge a party not thus favored a larger sum for the same service than was charged to the favorite shippers; that equal facilities, in many cases, were not furnished to all who desired to ship either goods, grain, or stock, and business, as far as possible, was thrown into the hands of favorite parties. It was also claimed that certain prominent competing points in the state which had paid large sums as donations to secure competing lines, had actually been discriminated against by the increase in rates, and that charges generally throughout the state were much higher than those of other states having the same amount of business. Other wrongs were claimed which need not be noticed here. To correct these wrongs, the legislature at its last session passed "An act to regulate railroads, prevent unjust discrimination, provide for a board of transportation, and define its duties, and repeal articles 5 and 8 of chapter 72, entitled 'Railroads,' of the Revised Statutes, and all acts and parts of acts in conflict therewith"—Compiled Statutes of 1887, pp. 563-570. The first section of the act provides that it shall apply to any common carrier or carriers engaged in the transportation of passengers or property by railroad under a common control, management, or arrangement for continuous carriage or shipment from any point in the state of Nebraska to any other point in said state, and requires that all charges made for any service rendered or to be rendered in the transportation of passengers or property shall be reasonable and just, and prohibits unjust and unreasonable charges, and declares them to be unlawful. The second section declares that no common carrier subject to the provisions of the act shall, directly or indirectly, by any special rate, rebate, drawback,

or other device, charge, demand, collect, or receive from any person or persons a greater compensation for any service rendered or to be rendered in the transportation of passengers or property than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. The third section declares it to be unlawful for any such common carrier to give any preference or advantage to any particular person, company, firm, corporation, or locality, or [on] any particular description of traffic, in any respect whatever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any prejudice or disadvantage in any respect whatsoever, and also declares that a railway connecting with other lines shall not discriminate in its rates and charges between such connecting lines. The fifth section prohibits the pooling of earnings of railways. The sixth section requires such railways to print and keep for public inspection, schedules showing the *rates and fares and charges* "for the transportation of passengers and property which any common carrier *has established*, and which are in force at the time upon its railroad, as defined by the first section of this act. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force upon such railroad, and shall also state separately the terminal charges and any rules or regulations which in anywise change, affect, or determine any part of the aggregate of such aforesaid rates and fares and charges. Such schedules shall be printed in large type, of at least the size of ordinary pica, and copies for the use of the public shall be kept in every depot or station upon any such railroad, [in] such places and in such form that they may be conveniently in-

spected. No advance shall be made in the rates, fares, and charges *which have been* established and published as aforesaid by any common carrier, in compliance with the requirements of this section, except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedule then in force, and the time made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules then in force at the time and kept for public inspection. Reductions in such published rates, fares, or charges may be made without previous public notice; but whenever any such reduction is made notice of the same shall be publicly posted, and the changes made shall immediately be made public by printing new schedules, or shall immediately be plainly indicated upon the schedule at the time in force and kept for public inspection. And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force."

It is contended by the attorneys for the respondent that without a charge actually made in reference to some specific freight and against some particular person, the statute is not and cannot be violated, and it is said, p. 6 of the respondent's brief, "A charge cannot be made when there is no property transported, and when there is no person for whom such property has been or is to be transported. There must be both a specific person and specific property, and the charge must be made for such specific property and against such specific person; and it must be for such serv-

ice rendered or to be rendered." The respondent's attorneys seem to ignore the remedy given by the statute, and place the claim for relief entirely upon the ground that there must be a charge actually made for services rendered before the question of the unlawful charges can be determined. The statute, however, requires the railway company to establish and publish its rates, fares, and charges before rendering the service. Suppose A, residing at Columbus, or other point in the interior of the state, wishes to ship goods to Omaha or Lincoln, but deems the charges excessive, the statute gives him the right to complain of such charges as being excessive, and ask that they shall be fixed at such sum as shall be reasonable and just, as provided in the first and sixth sections of the act. The first section declares that every unjust and unreasonable charge is prohibited and declared to be unlawful. The board of transportation, therefore, is clothed with power to determine what is a just and reasonable charge on all the lines of railway within the state, and this may be done in advance of the rendition of the service.

The seventh section requires such railway company to file with the board copies of its schedules of its rates, fares, and charges, which have been established and published in compliance with the statute, and promptly to notify said board of all changes made in the same, and, also, to file with said board copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party, and in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates, or fares, or charges, for such continuous lines or routes, copies of such joint tariffs shall also in like manner be filed with said board, such continuous lines shall publish the joint rates, fares, and charges thereon,

when so directed by the board, and may be compelled to publish the same, if on such request they neglect or refuse to do so. The eighth section makes it unlawful for such common carrier to enter into any combination, contract, or agreement, express or implied, to prevent by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freight being continuous from the place of shipment to the place of destination. The ninth section authorizes a recovery against any such carrier as shall do, cause to be done, or permit to be done, any act, matter, or thing, in this act prohibited, or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done. The tenth section provides the procedure by any person claiming to be damaged. The twelfth section authorizes the board to inquire into the management of the business of all common carriers subject to the provisions of the act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the board to perform the duties and carry out the object for which it was created, and it is clothed with power to require the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents, relating to any matter under investigation, and it may invoke the aid of either the district or supreme court to require the production of the required witnesses or documents. The thirteenth section provides that any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any politic or municipal organization, complaining of anything done, or omitted to be done, by any common carrier subject to the provisions of the act, in contravention of the provisions thereof, may apply to said board by petition, which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded

by the board to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing within a reasonable time, to be specified by the board. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the board to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of absence of direct damage to the complainant. That is, railroads being public ways, and subject to legislative control, any violation of the statute by them is a matter of public right and to procure the enforcement of a public duty it is sufficient for the complainant to show that he is a citizen, and as such, is interested in the execution of the laws. *State v. Shropshire*, 4 Neb., 413-14. *Hall v. The People, ex rel.*, 57 Ill., 313. *State, ex rel., v. Judge*, 7 Iowa, 202. *Hamilton v. State*, 3 Ind., 458. *The People v. Halsey*, 37 N. Y., 348. *The State v. Stearns*, 11 Neb., 106.

The fourteenth section requires the board to make a report in writing in respect to any investigation which they have made, which shall include the *findings of fact* together with a recommendation as to what reparation, if any, can be made by the common carrier to the party injured, and such findings shall be deemed *prima facie* evidence of every such fact found. The fifteenth section declares that if it be made to appear to the satisfaction of the board, either by the testimony of witnesses, or other evidence, that anything has been done, or permitted to be done, in violation of the provisions of this act, or any law cognizable by said board by any common carrier, or that

injury or damage has been sustained by the party or parties, complaining, or other parties aggrieved, in consequence of any such violation, it shall be the duty of the board to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to such common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done, or both, within a reasonable time, to be specified by the board. The sixteenth section declares that if such railway companies "shall violate, or refuse, or neglect to obey, any lawful order or requirement of the board in this act named, it shall be the duty of the board, and lawful for any company or person interested in such order or requirement, to apply in a summary way, by petition filed in the judicial district in which the common carrier complained of has its principal office, or in the district in which the violation or disobedience of such order or requirements shall happen, alleging such violation or disobedience, as the case may be, and the said court shall have power to hear and determine the matter on such short notice to the common carrier complained of, as the court shall deem reasonable, and said court shall proceed to hear and determine the matter speedily as a court of equity, but in such manner as to do justice in the premises; and to this end the court shall have, if it think fit, [power] to direct and prosecute in such mode and by such persons as it may appoint; and such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the report of said board shall be *prima facie* evidence of the matters therein stated; and if it be made to appear to such court on such hearing, or on report of any such person or persons, that the lawful order or requirement of said board drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction, or other proper process, mandatory or otherwise, to restrain such common

carrier from further continuing such violation or disobedience of such order or requirement of said board, and enjoining obedience to the same; and in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and, if a corporation, against one or more of the directors, officers, or agents of the same, or against any owner, lessee, trustee, receiver, or any other person failing to obey such writ of injunction, or other proper process, mandatory or otherwise; and said court may, if it shall think fit, make an order, directing such common carrier, or other person so disobeying such writ of injunction, or other proper process, mandatory or otherwise, to pay such sum of money, not exceeding for each carrier or person in default the sum of five hundred dollars for every day, after a day to be named in the order, that such carrier, or other person, shall fail to obey such injunction, or other proper process, mandatory or otherwise."

The mention of the district court in the above section does not exclude the supreme court from hearing any case in which it has original jurisdiction.

Section seventeen provides that "said board shall have the general supervision of all railroads operated by steam in the state, and shall inquire into any neglect of duty or violation of any of the laws of this state by railroad corporations doing business in this state, or by any officer, agent, or employe of any railroad corporation doing business in this state; and shall, from time to time, carefully examine and inspect the condition of each railroad in this state, and its equipments and manner of the conduct and management of the same, with reference to the public safety, interest, and convenience. It shall carefully investigate any com-

plaint made in writing and under oath, concerning any lack of facilities, or accommodations, furnished by any railroad corporation doing business in this state, for the comfort, convenience, and accommodation of individuals and the public; or any unjust discrimination against either any person, firm, or corporation, or locality, either in rates, facilities furnished, or otherwise; and whenever, in the judgment of said board, any repairs are necessary upon any portion of the road, or upon any stations, depots, station-houses, or warehouses, or upon any of the rolling stock of any railroad doing business in this state, or additions to, or any changes in its rolling stock, stations, depots, station-houses, or warehouses are necessary, in order to secure the safety, comfort, accommodation, and convenience of the public and individuals, or any change in the mode of conducting its business, or operating its road, is reasonable and expedient, in order to promote the security and accommodation of the public, or in order to prevent unjust discriminations against either persons or places, it shall make a finding of the facts, and an order requiring said railroad corporation to make such repairs, improvements, or addition to its rolling stock, road, stations, depots, or warehouses, or to make such changes, either in the manner of conducting its business, or in the manner of operating its road, as such board shall deem proper, reasonable, and expedient."

It will thus be seen that the board is clothed with the "general supervision of all railroads operated by steam in the state." * * * * * And it is made its duty to "carefully investigate any complaint in writing and under oath, concerning * * * * * any unjust discrimination against either any person, firm, or corporation, or locality, either in *rates*, facilities furnished, or otherwise, * * * * * in order to *prevent* unjust *discriminations* against either *persons* or *places*; it shall make a finding of the facts and an order requiring said

railroad corporation * * * * to make such changes * * in the manner of conducting its business as such board shall deem proper, reasonable, and expedient."

Webster defines the word "supervision" to be "The act of overseeing; inspection, superintendence." The board, therefore, is clothed with the power of overseeing, inspecting, and superintending the railways within the state, for the purposes of carrying into effect the provisions of this act, and they are clothed with power to prevent unjust discriminations against either persons or places.

The attorneys for the respondent contend that the act is to receive a strict construction. No satisfactory reason, however, was given for the adoption of such rule. The act is remedial in its nature, and is designed to prevent and punish abuses in the management of some or all of the railways of the state, and in construing remedial statutes, there are three points to be considered, viz., the old law, the mischief, and the remedy; that is, how the law stood at the making of the act, what the mischief was for which the former law did not provide, and what remedy the legislature has provided to cure this mischief, and it is the business of courts so to construe the act as to suppress the mischief and advance the remedy. 1 Bl. Com., 87. *Rogers v. Omaha Hotel Co.*, 4 Neb., 58.

Here is an act which declares that all charges *shall be just and reasonable*, prohibits and declares unlawful all unjust and unreasonable charges; which requires schedules of such just and reasonable charges to be posted for the use of the public, and prohibits an advance in rates except upon certain conditions; which prohibits any preference in favor of or against any person or place; which requires the board to investigate all complaints against any railway corporation doing business within the state, and gives such board power to call for persons and papers in order that their investigations may be thorough and the report thereof based upon facts, and also makes their finding of fact *prima*

facie evidence thereof, and requires said board to investigate and prevent any unjust discrimination against either any person, firm, corporation, or locality. These are broad powers. They are not to be restricted. Such powers were conferred for the express and declared purpose of fixing charges which shall be reasonable and just, and prohibiting unjust and unreasonable charges and unjust discrimination. The court has no authority to limit the board in any respect, in that regard. Such board is to determine, in the first instance, at least, what are reasonable and just charges, what unreasonable and unjust, and when any person, firm, corporation, or locality is unjustly discriminated against. There can be no restriction of the word "locality;" it may refer to a village, city, county, or portion of the state, the meaning in each case to be determined by the territory which the board shall find to be unjustly discriminated against. If there is discrimination against any person, firm, or corporation, it is the duty of the board so to find, and to require the railway company to cease its discrimination. To do so such board has the authority to require such railway company to reduce its rates to a reasonable and just standard. The power to fix a reasonable and just rate is clearly conferred on the board, as also the power to determine what rates are unjust and unreasonable. It is the duty of the board to prevent unjust discrimination in all the forms mentioned in the statute, and to do so it may determine what is a proper charge to and from any points within the state, and its order in that regard based on its finding of facts will be *prima facie* evidence of the correctness of the order.

In the case under consideration the board found that the rates and charges of the respondent were excessive; in other words, that there was unjust discrimination against that part of the state, and having so found, the board is clothed with ample power to require such railway company to reduce its rates and charges. The power of the board, there-

fore, to establish and regulate rates and charges upon railways within the state of Nebraska is full, ample, and complete.

4th. Some objection is made to the remedy by mandamus, and it is said by the attorneys for the respondent that the writ may not issue where there is a plain and adequate remedy in the ordinary course of the law [Code, Sec. 646]; and therefore "it may not issue in this case, because there is a plain and adequate remedy in the law for enforcing the order of the board of transportation, if its order is a lawful one, by application to the district court in the mode pointed out by the 16th section of the act of 1887. That the proceeding under the 16th section is both plain and adequate.

"That the legislature did not intend to authorize or permit the enforcing of all orders of the board by mandamus, is clear, from the fact that as to the particular matters mentioned in the 17th section, it gave authority to proceed by mandamus as the only and exclusive remedy for enforcing such orders, and as to all other orders in reference to all other matters mentioned in the act, the legislature provided as the only and exclusive remedy an application in the first instance to the district court, as provided in section 16.

"The fact that the legislature specifically gave the right to proceed by mandamus, in the cases mentioned, in the 17th section only, and provided other specific and adequate remedy for all other cases, leaves no doubt that it was the intention of that body that mandamus should only be resorted to in the cases provided for in the 17th section."

These objections are untenable. They are that the district court alone has jurisdiction, and not that the relator has another remedy besides mandamus. But even if the objections were to the form of the remedy, they could not be sustained. The fact that an action will lie does not supersede the remedy by mandamus. If the remedy by an action is not plain and adequate, a mandamus may be issued, notwithstanding an action would lie. *State v.*

Stearns, 11 Neb., 107. Thus while a party aggrieved by some violation of the statute by the respondents might maintain an action against such respondent, yet if such remedy was not adequate it would not prevent him from enforcing his rights by mandamus. The test to be applied in determining the right to relief by mandamus is to inquire whether the relator has a clear legal right to such writ, and whether he has any other *adequate* legal remedy. *People v. Head*, 25 Ill., 325. *People v. Hilliard*, 29 Ill., 418. In the case at bar the relators show a clear legal right to have the order made by them complied with. *People v. Mayor*, 51 Ill., 28. *People v. Brooklyn*, 1 Wend., 318. And this writ may be applied for in a proper case in the supreme court under any section of the act which authorizes the filing of an application in the district court for such writ. In many cases the district court is unable to grant adequate relief, its jurisdiction being limited to a particular county. Thus suppose the board of transportation, as in the case under consideration, should order a railway company to reduce its rates and charges on all its lines within the state, a question might, perhaps, arise as to the power of the district court to act on rates without the county in which the action was brought. So in cases of like character. But where the action is instituted in the supreme court no question of that kind can arise; nor can the party be debarred by any statute of a constitutional right. The supreme court, therefore, has jurisdiction in the case, and mandamus is the proper remedy. The demurrer, therefore, is overruled, and a peremptory writ will issue within ten days from this date, unless the respondent, within that time, shall present to the court an answer showing compliance with the alternative writ, or a defense to the action upon the facts.

JUDGMENT ACCORDINGLY.

THE other judges concur.

JOHN FAGER, PLAINTIFF IN ERROR, v. THE STATE OF
NEBRASKA, DEFENDANT IN ERROR.

1. **Rape: EVIDENCE.** In a prosecution for rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn.
2. **Trial: QUESTIONS BY PRESIDING JUDGE.** While it is the right of a trial judge to interrogate witnesses when essential to the administration of justice, yet the practice of so doing, except when absolutely necessary, should be discouraged. The common law rule conferring arbitrary power upon trial judges has been so far modified by the code as to greatly limit this power, and, in case of its abuse, a reviewing court would not hesitate to give a new trial to the injured party.
3. —: **ADMISSION OF IMPROPER TESTIMONY.** Where it is claimed that improper testimony was allowed to be given to a jury in the trial of a cause, it must appear by the bill of exceptions that objection thereto was made, upon which there was an adverse ruling, and to which exception was taken at the time. Otherwise it cannot be reviewed in the supreme court.

ERROR to the district court for Saline county. Tried below before MORRIS, J.

E. S. Abbott and *R. D. Stearns*, for plaintiff in error.

1. Evidence. *Oleson v. State*, 11 Neb., 276. *Laughlin v. State*, 18 Ohio, 99. *Johnson v. State*, 17 Id., 593.
2. Power of trial judge. *State v. Lee*, 80 North Car., 484. *Epps v. State*, 19 Ga., 118. *Shirwin v. People*, 69 Ill., 55. *Fisher v. People*, 23 Id., 283. *Wright v. State*, 69 Ind., 163.

William Leese, Attorney General, for the State.

1. Evidence. *McCombs v. State*, 8 Ohio State, 643. *State v. Kinney*, 44 Conn., 153. *Brown v. People*, 36 Mich., 204. *Phillips v. State*, 9 Humph., 246. *People v. Gage*, 28 N. W. R., 835. 2. Authority of judge to question witnesses. *Hill v. State*, 5 B. J. Lea, 730. *State v. Lee*, 80 N. C., 484. *Com. v. Galavan*, 9 Allen, 271. *Palmer v. White*, 10 Cush., 321. Wharton Evidence, Secs. 281, 496.

REESE, J.

Plaintiff in error was convicted of the crime of rape. The record is quite voluminous, and were we inclined to go outside of the questions presented for decision, it is quite probable sufficient objection might be found to justify the reversal of the judgment of the district court, but as it has been the uniform holding of this court that it will not travel outside the case presented by counsel, except when the question of jurisdiction is involved, or in favor of life, we can notice only the questions presented for decision.

It is insisted by plaintiff in error that there is no proof of rape, or even of contact, except that of the prosecutrix.

While this is true in one sense, yet in the sense in which corroborating circumstances may aid the prosecution it is not true. We do not understand the rule in such cases to require corroborating testimony to the particular fact of the rape. If such were required, convictions could seldom be had, even in the most flagrant cases. Men engaged in the commission of offenses of this kind seldom call witnesses to the fact, or attack women who are not alone and within their power.

The testimony shows that plaintiff in error was engaged in collecting cream for a creamery in the neighborhood in which the prosecutrix resided, and that prior to the time of the alleged crime, when getting cream of a family with whom the prosecutrix resided, they had met, and knew each

other. The prosecutrix was a girl about 14½ years old, and resided with the family of A. J. Miller. Her younger sister resided near by with the family of C. A. Helms. Miller and his family were away from home, in York county, to be absent, at least, over night. Helms and his wife were also from home and returned late in the evening on which the crime was alleged to have been committed. By the testimony of witness Munson, who resided with Helms, and who was acquainted with the plaintiff in error, it is shown that plaintiff in error went to the house of Helms on the evening in question in a covered buggy, hitched his horse, went to where Mr. Munson was, and asked him where Mr. Miller was? Upon being informed that he was in York county, he then inquired where Iva Smith, the prosecutrix, was? Munson informed him she was there, and in the house. He then told Munson there was to be a party at Mr. Parks' that night, and they wanted her to come down, and requested Munson to see her and inform her of what he said. Munson remarked he did not think she would come, as Miller was "pretty strict with her," but he would tell her.

She was informed, and, after some hesitation, got into the buggy and went with plaintiff in error, going first to Miller's and changing her clothing.

A. J. Miller testified that soon after the occurrence, he, with Mr. and Mrs. Helms and Mr. Munson, went with the prosecutrix to the spot where she claimed the crime had been committed, and there found horse's tracks, south of the road, as she had stated, and, from the appearance of the tracks in the grass, it was evident that the horse had stood there for some little time. These facts are also testified to by others, who observed the same things.

Mr. Helms testified that he was in Dorchester on the afternoon of the day in question, and saw plaintiff in error with a horse of the kind testified to by Munson, hitched to a covered buggy, going north, which was in the direc-

tion in which Mr. Helms lived. This was about half an hour before sundown. Late in the evening, Mr. Helms went home, and, as he supposes, about 9 or 10 o'clock, when within a mile or so of home, he met plaintiff in error in a buggy, driving rapidly to the south. The witness thought at this time that some person was with plaintiff in error in the buggy, but as to who it was, if any such were there, witness could not tell.

Another witness, Mr. J. M. Johnson, met plaintiff in error, the same night, somewhat later, about a mile north of Dorchester, driving south, towards towp, with a horse and buggy of the same description as that given by the other witnesses, and, as was the case with Mr. Helms, plaintiff in error did not give the road, and a collision seemed imminent. Mr. Johnson spoke to the horse, and he stopped. Plaintiff in error was alone, and appeared to be asleep. The witness says, "I slapped him on the face with my hat." He said, "There, get out, or pull out." The testimony of these witnesses, all of whom were acquainted with plaintiff in error, when added to the positive testimony of the prosecutrix, who also knew him, leaves no doubt whatever upon the mind as to his identity.

The theory presented by the plaintiff in error is, to the mind of the writer, entirely improbable. He admits that probably it was his horse and buggy, but denies that it was himself. He claims that he started upon an errand, and went some two or three miles out of Dorchester, where he overtook a young man, who claimed he had been at work for a neighbor, and took him into the buggy; that the young man had a bottle of liquor, out of which plaintiff in error took a drink or two, and that upon reaching the timber of the west Blue river he was drunk; that the young man left him there asleep and went away with the horse and buggy. That after a while the young man returned, helped plaintiff in error into the buggy, and sent him home, about midnight.

While this is pressed with considerable ingenuity by counsel, yet we cannot adopt it. The testimony of Munson is clear, direct, and positive, and we can see no reason why it is not entitled to credit.

It is next claimed that the testimony of the prosecutrix, as to what happened at the time of the alleged commission of the offense, is unsatisfactory, and, in some important matters, contradictory. In some respects, this is true, and, indeed, it could hardly be expected to be otherwise. The testimony of this witness occupies 36 printed pages of the record. Her cross-examination was rigid, searching, and of great length, and when coming to minute details of the perpetration of this crime, in her efforts to give details, in answer to the questions, she made some statements which may seem unreasonable. It is hardly probable that a girl of her age and want of experience would form proper conceptions of what was done, or just how it was done, and be able to detail them upon the witness stand without apparent contradictions, resulting from lack of a clear understanding of the question, or some other cause. By a fair analysis of her testimony, however, many seeming contradictions are more apparent than real. The examination-in-chief was not skillfully conducted, many of the interrogatories embodying three or four questions, the last of which was very naturally answered by her, while those preceding it were left unanswered. The order of events was necessarily lost sight of by her, and she was placed in the attitude of answering many questions which might be applied to any stage of the transaction. The cross-examination, of course, tended to increase these apparent discrepancies; but the testimony of the witness throughout, corroborated, as it is, upon many important facts, leaves no question but that the verdict of the jury is sufficiently supported by the testimony, so far as the objections presented by the plaintiff in error attack it.

Before making his statement to Munson, plaintiff in

error seems to have satisfied himself that neither the family of Miller nor Helms was at home. Upon the plausible representations made to her, the prosecutrix accompanied him, as one of her age and lack of judgment might be liable to do.

Whether or not there was a party at the residence of Mr. Parks, neither party seems to have thought it necessary to inquire, perhaps rightly, as no effort was made to reach the place designated. It can hardly be necessary to state here what occurred at the time of the commission of the offense. It is not contradicted, and no good could result from entering upon its narration.

Upon the oral argument, it was insisted that there was error in the case, because the prosecutrix was permitted to testify to the complaint she made to Mrs. Helms, immediately after the alleged offense, upon her return to Mrs. Helms' house. Had the question of the admissibility of this testimony been presented to the trial court by the proper objection and exception to its ruling, if adverse, this question would have been presented for review. But no such objection was made, therefore no ruling or exception, so far as is shown by the record. The examination was made with the consent of the plaintiff in error, and he cannot now object.

These observations apply with equal force to the questions propounded to the prosecutrix by the court, so far as they relate to the testimony of the witness as to the complaint made. No objection was made to any of them. If any error existed it was waived.

At another period in the trial and during the examination of the witness, the court propounded certain questions to her, as to the character of her underclothing, and the exact position of plaintiff in error with reference to her during the occurrence, which were objected to by him upon the grounds: 1st, because the court asks them; 2d, because they were irrelevant, immaterial, and incompetent.

As to the first objection, it must be sufficient here to say that circumstances might arise in which it would be the duty of the court to propound questions and insist upon direct and unequivocal answers. It sometimes becomes necessary for the presiding judge to take this course, especially if there is an apparent misunderstanding between the witness and the person propounding the question, or where a witness is diffident, obtuse, or unfriendly, and the simple fact that the questions here referred to were propounded by the court would not of itself be sufficient to reverse the judgment.

As to the materiality, relevancy, or competency of the testimony, there can be no doubt. The question was concerning the condition of the underclothing of the prosecutrix, the principal one of which was as follows: "Were the drawers you wore that night tight drawers?" Answer: "Yes, sir." We can see no good reason why the plaintiff in error can complain of this. The answer was beneficial to him rather than otherwise. Even were the relevancy or materiality of this testimony questionable, it was wholly without prejudice.

The next question presented is as to the conduct of the presiding judge during the trial. The objection is to the course pursued by him in the examination of the witnesses. Questions were asked by him, some of which were upon material points, and somewhat leading at times. This question has not been before this court heretofore, and is one of importance as bearing upon the practice in this state, and also as affecting the authority and duties of the presiding judge. It is insisted that as public prosecutors are provided by law and at public expense, it should be left to them alone to conduct prosecutions without any suggestions from the court; that the prosecuting attorneys of the several district courts are selected by the people with a view to their fitness and qualification for the position, and that it is the spirit of the law that trial

Fager v. State.

judges leave the matter of presenting testimony entirely in their hands. As a matter of practice in this state, we think the rule generally adopted by the judges has been to avoid examining witnesses, and to permit the case to go to the jury as made by the attorneys. This of course is subject to the exception above stated, in which case there can be no doubt as to the right and duty of a trial judge. Courts should also see that the examination of a witness is conducted in fairness to both of the litigants, and to the witness. Whether or not a judge has a right to go beyond this under the provisions of our criminal code, might become a serious question. At common law the right was not questioned.

In Wharton Criminal Evidence, 8th Edition, Sec. 452, it is said: "The trial court, at any period of the examination, may put questions to the witness, for the purpose of eliciting facts bearing on the issue, and the witness may even be recalled for this purpose, or a witness not called by the parties may be called and examined by the court; nor is the court, as to evidence, bound by the rule excluding leading questions, but an answer, not in itself evidence, brought out by the questions of the court, may be ground for reversal." This rule has been sustained in *Epps v. State*, 19 Georgia, 102. See also Archibald Cr. Pl., 163. 1st Wharton Evidence, Secs. 281 and 496. *State v. Lee*, 80 N. C., 484.

Assuming that the rule above cited is the correct common law rule, the question arises, has the code so far changed this rule as to require a reversal of the judgment in this case, upon the conduct of the trial judge?

As a matter of law we cannot say that in this case the trial judge so far exceeded the rule which is claimed to have been established by the code as to require a new trial for that cause alone. While it is apparent that the course pursued by the trial judge was not prejudicial to plaintiff in error, yet we deem it proper to suggest that judges have,

to a very great extent, been shorn of the arbitrary power conferred upon them by the common law.

It is not necessary here to refer to that which is known by every student of the law, that at common law the authority of the trial judge was deemed to be absolute, and in many instances was greatly abused. This power has, to some extent at least, been removed by the beneficent provisions and spirit of the criminal code. The trial judge must have the right to superintend the general course of trials of causes before him, as well as the conduct of counsel engaged therein, but this authority should be carefully and moderately exercised. The judge should be so absolutely impartial upon the trial of a cause as to give no ground for suspicion that he has any opinion upon the merits of the cause on trial, and the greatest care should at all times be observed that no act or word should escape which would deprive a judge of the well-earned reputation of American courts for absolute impartiality.

While, as we have said, the conduct of the trial judge to which objection has been made cannot be said to have worked prejudice to plaintiff in error, and does not call for a reversal of the case, yet we think that were a case presented involving the abuse of judicial authority to the prejudice of an unsuccessful litigant, the reviewing court should not hesitate to reverse the judgment, that a fair trial might be had.

The last question presented and urged by counsel for plaintiff in error is, that the punishment imposed is excessive, and for that reason a new trial should be granted. The judgment is, that the plaintiff in error be confined in the penitentiary for the period of 12 years. Under all the circumstances, we agree that the punishment is excessive, but this of itself does not require the granting of a new trial. Under the provisions of an act of the legislature, approved March 31st, 1887, the authority is given directly to the supreme court, in cases of this kind, when,

in its opinion, the sentence is excessive, to reduce the sentence of the district court as in their opinion may be warranted by the evidence. Crim. Code, Sec. 509a. Applying this provision to the case at bar, it is believed that the case requires the exercise of the power conferred, and the sentence of the district court should be reduced to six years.

The judgment of the district court will therefore be so far modified as to reduce the sentence as above indicated, and the judgment will be that plaintiff in error be confined in the penitentiary, at hard labor, but without solitary confinement, for the term of six years from the date of the judgment of the district court. In all other respects the judgment of the district court is affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

MAXWELL, CH. J.

I concur in the modification of the judgment in this case, and also in the points stated in the syllabus. In my view our statute has changed the common law so far as to practically prohibit the presiding judge from examining the witnesses in whole or in part in a criminal case. Under the common law, as counsel was not allowed to a prisoner in the trial of a charge of felony, the judge was supposed to act as the prisoner's counsel. It became the judge's duty, therefore, to cross-examine the witnesses, and protect the rights of the accused. In this country, however, the common law rule which denied counsel to a person accused of felony has not prevailed, and one of the guarantees of the constitution of the United States and of this state is, that a party accused of crime shall be entitled to counsel to make his defense, and a trial before an im-

partial jury. A trial cannot be fair and impartial if the judge is permitted, either directly or indirectly, to express an opinion upon the facts. His opinion necessarily would have great weight with the jury, and as he is not permitted directly to give his views upon the facts he should not be permitted to do so indirectly, either by his conduct or the form of questions to witnesses. It may be said that in some cases it would be impossible to convict a party unless the judge should bring his influence to bear upon the jury. Such an argument, instead of being in favor of the practice, is directly opposed to it. Ordinarily, if the facts will justify the jury in finding a verdict of guilty, the probabilities are that they will do so. If the testimony leaves the guilt of the accused in doubt he is entitled to the benefit of that doubt, and no influence outside of the testimony should be brought to bear upon the jury to induce them to overcome such doubt. Otherwise, the accused will be deprived of a constitutional guaranty—a fair trial, and perhaps be unjustly convicted.

Our statute prohibits oral instructions to a jury except by consent of parties, and this prevents the judge from directing the jury in any manner, unless in writing in the presence of the parties, where exceptions may be taken to the ruling or direction. A fair trial means a trial before an impartial jury, who without extraneous influence will be guided by the testimony alone in rendering a verdict.

The law clothes the judge with power to determine the law, and entrusts to the jury all questions of fact; and this division of duties should be recognized and adhered to on a trial.

OMAHA & REPUBLICAN VALLEY RAILROAD CO.,
PLAINTIFF IN ERROR, V. ALFRED STANDEN, DE-
FENDANT IN ERROR.

- 1 **Railroads: NEGLIGENT CONSTRUCTION OF BRIDGE: PLEADING.** Where an action is brought to recover damages for the negligent construction of a railway bridge across the Platte river, whereby it became an unlawful obstruction therein, *Held*, Under the liberal rules of construction of the code, that the petition alleged sufficient to authorize a recovery.
2. ———: **CONSTITUTIONAL LAW.** The insertion of the words "or damaged" in section 21, Art. I., of the constitution of 1875, was intended to give a right of recovery which did not previously exist, and was not intended to limit or restrict any remedy previously existing.
3. ———: ———: **RIGHT OF ACTION.** Where a railway bridge is so negligently constructed across a river as to form an unlawful obstruction, and become a nuisance by causing an overflow of the river, no right of action accrues to a landowner until he sustains an actual injury caused by such unlawful obstruction—as by the overflow of his lands.
4. **Nuisance: DAMAGES: CONTINUING NUISANCE.** Where a nuisance is a continuing one, in consequence of which damages are sustained, a recovery is limited to damages which may have accrued before the action is brought, and one action is not a bar to a second action brought for damages thereafter sustained.

ERROR to the district court for Saunders county. Tried below before MARSHALL and POST, J.J.

W. R. Kelly, for plaintiff in error, after citing numerous cases (including *City of Elgin v. Eaton*, 83 Ill., 535. *C. & E. I. R. R. v. Loeb*, 118 Id., 203. *Hutchinson v. Parkersburg*, 25 West Va., 226. *Fowle v. N. H. & N. R. R.*, 107 Mass., 352; 112 Mass., 334. *Same v. McAley*, 11 N. E. Rep., 67. *Reardon v. San Francisco*, 66 Cal., 501. *Gottschalk v. R. R.*, 14 Neb., 550. *Penn. R. R. v. Duncan*, 111 Penn. State, 352. *Blanchard v. Kansas*

33	343
33	355
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29	504
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41	671
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50	711
22	343
57	131
57	132
62	460

City, 16 Fed. Rep., 444. *Rigney v. Chicago*, 102 Ill., 67. *Harmon v. City of Omaha*, 17 Neb., 548), made the following points:

1st. In every case where, under authority of law, a public work for public use has been erected, no specific detail or plan thereof being provided therefor by law, then the plan, method, and details must be adopted by the company or corporation performing the work, and that when it has adopted and completed such work, it will be treated as a permanent structure, and the corporation held to intend to use, occupy, and enjoy such work in the manner contemplated by its character, and for the time and purpose authorized by its charter; and

2d. That, as to any and all persons whose property is not actually taken, but whose property is "damaged" or "injuriously affected" by such public work or structure, as constructed or completed, whether properly or improperly, it owes the duty and obligation, and that this duty and obligation may be enforced by such person by an action to recover such damages.

3d. That this action is one complete in itself to recover for all "damages" which the "property" in its entirety has sustained.

4th. That the measure of damages in such cases involves a comparison between the value of the property before the erection of the public work and after the completion in the manner in which it was done.

5th. That this action accrues to the owner of the property at the time of the erection of the structure.

6th. That no subsequent grantee of such owner can maintain any action for any injury to the same property, based upon the conditions or character of such structure.

7th. That this action, under the constitution, for all damages accruing to the plaintiff's property, having accrued in 1877, it is now barred by the statute of limitation.

8th. That general public policy, adopted by the people, engrafted upon the fundamental law of the state, is, that "multiplicity of suits" against corporations, private or municipal, engaged in carrying on works for public uses, shall be avoided. That all such corporations shall, once for all, on demand of an injured party, make just compensation for all damages they may inflict upon private property by an act, proper or improper, done by them in the exercise of the powers conferred upon them to construct and maintain such work.

W. H. Munger and E. F. Gray, for defendants in error.

To sum up this whole matter in a sentence, we say that defendant's bridge and approaches are legally located, and defendant has a legal right to maintain a bridge and approaches at this point, but the bridge and approaches are not properly built, and this improper construction causes gorges, overflows, and consequent damage to adjoining proprietors in the spring of the year, and therefore the bridge and approaches are unlawful—a nuisance periodically, recurring at long intervals—a nuisance in the common legal significance of the word—and by the authority of at least every well considered case upon the subject, a new cause of action accrues for each recurring damage. *Uline v. N. Y. C. R. R.*, 101 New York, 98. Gould on Waters, section 412, and cases cited. *New Salem v. Eagle Mill Co.*, 138 Mass., 8. *Union Trust Company v. Cuppy*, 26 Kan., 754. *Brown v. Cayuga & Susquehanna R. Co.*, 12 N. Y., 486. *Conhocton Stone Co. v. B., N. Y. & E. R. Co.*, 52 Barb., 390. *Beckwith v. Griswold*, 29 Barb., 291. *Duryea v. Mayer*, 26 Hun, 120, 122. *Waggoner v. Jermaine*, 3 Denio, 306. *Mahon v. N. Y. C. R. Co.*, 24 N. Y., 658. *Van Hoosier v. H. & St. J. R. Co.*, 70 Mo., 145. *Dickson v. C., R. I. & P. Ry. Co.*, 71 Mo., 575. *Bare v. Hoffman*, 79 Pa. St., 71. *Wheatley v. Chrisman*, 24 Pa.

St., 298. *Fell v. Bennett*, 5 Atlantic Rep., 17 (Pa.)
Cooper v. Hall, 5 Ohio, 320. *McElroy v. Goble*, 6
 O. S., 187. *Thayer v. Brooks*, 17 Ohio, 489. *Delaware*
& Raritan Canal Co. v. Wright, 21 N. J. L., 469. *Delaware*
& Raritan Canal Co. v. Lee, 22 N. J. L., 243.
Prentiss v. Wood, 132 Mass., 486. *Staple v. Spring*, 10
 Mass., 72. *Carl v. Sheboygan & F. D. L. R. Co.*, 1 N.
 W. R., 295 (Wis.) *Ramsdale v. Foote*, 13 N. W. R., 557
 (Wis.) *Cain v. C., R. I. & P. R. Co.*, 3 N. W. R., 736
 (Ia.) *Drake v. C., R. I. & P. R. Co.*, 19 N. W. R., 215
 (Ia.)

MAXWELL, CH. J.

The defendant in error brought an action against the plaintiff to recover damages for the negligent and wrongful construction of its bridge across the Platte river, whereby it is alleged that in March, 1886, a gorge was formed above the bridge, which threw the water of the Platte river out of its course, over the lands of the defendant in error, and thereby caused him a large amount of damage. The railroad company demurred to the petition upon the grounds that the facts stated therein were not sufficient to constitute a cause of action. The demurrer was overruled, and the company declining to answer, a judgment was rendered against it for the sum of \$1,000. It now prosecutes a petition in error in this court, the question being: Does the petition state facts sufficient to constitute a cause of action?

It is alleged in the petition that "the said defendant now is, and ever since the year 1875 has been, a corporation duly incorporated and organized under and pursuant to the laws of the state of Nebraska, and ever since the year 1877 has been the owner of, and engaged in running and operating, a railroad leading from Valley station, in Douglas county, to Lincoln, through the counties of Douglas, Saunders, and

Lancaster, in the state of Nebraska; that the plaintiff now is, and ever since the year 1882 has been, the owner in fee and in actual possession of the lands described as the south-west quarter of section six in township fifteen north, of range ten east, and the north-east quarter of the south-east quarter and north half of the south-east quarter of the south-east quarter, and lot seven, and the north twenty-six and $\frac{40}{100}$ acres of lot nine of section one of township fifteen north, of range nine east, comprising two hundred and fifty-nine acres in all, and all lying and being on the bottom land of the Platte river, and bordering on said river on the north bank thereof, in Douglas county, Nebraska; that ever since the year 1882, down to the committing of the wrongs and injuries hereinafter complained of, the plaintiff resided on said lands with his family, and erected and maintained a dwelling house, barn, stables, store-houses, corrals, feed yards, field and pasture fencing thereon, and cultivated a large portion of said lands as a farm, and on a portion forest trees grew naturally, and on a portion plaintiff maintained a meadow for hay and pasture for horses, cattle, and hogs, and carried on the business of raising, feeding, and fattening cattle and hogs, and kept many horses and large quantities of hay and grain on said lands; that plaintiff's immediate grantor of said lands, one Everett G. Ballou, had for not less than ten years immediately preceding his sale and conveyance to plaintiff of the same, owned and been in actual possession of, and resided on, said land, and cultivated, used, and maintained the business thereon, the same as the plaintiff after his ownership and occupation thereof, as aforesaid; that the plaintiff's said lands, ever since the year 1872, and as in its natural state and condition, were and have been lower than the banks of said Platte river, and as well as all the lands round about the plaintiff's said land, for many miles, were and have been, ever since the year 1872, and as in its natural state, lower than the banks of said

river; and plaintiff's said lands, and as well as the said lands round about, ever since the year 1872, and as in its natural state, were and have been liable to be overflowed by any obstruction of the natural flow of said river; that the defendant, well knowing all of the foregoing facts, and of the said conditions of said lands, and of the occupation, improvement, and business thereon maintained, as aforesaid, and against and contrary to notice and warning, did negligently, unlawfully, and wrongfully, in the month of November, 1876, commence, and by the month of July, 1877, complete and construct and erect a railroad bridge on its said line of railroad, between the counties of Douglas and Saunders, in Nebraska, over and across the said Platte river, for its exclusive use, at a point about one-quarter of a mile above the plaintiff's said lands, in a westerly direction therefrom, the said bridge being so erected and constructed as to create an unlawful obstruction in said river, and to prevent the natural flow of ice and water therein, and to cause the natural flow of ice and water in the spring of the year to gorge, back up, and overflow the banks of said river, and thereby greatly injure and damage adjoining lands and property, and especially the said lands of the plaintiff, as aforesaid, and the property thereon and business thereon maintained, as aforesaid; that by reason of the said bridge, and as well the approaches thereto, being so negligently, wrongfully, unlawfully, and improperly constructed and erected by said defendant, as aforesaid, the said bridge and its approaches, on or about the 27th day of February, 1886, did so obstruct the natural flow of ice and water in said Platte river, as to threaten an ice gorge and blockade at such point, and thereby cause the ice and water in said river to break over the north bank thereof, and to flow over the adjoining lands, and especially of the plaintiff's said lands, to the immediate injury thereof, and to the injury and destruction of the plaintiff's said property and business thereon, all of which facts de-

fendants well knew at the said time of such threatened and impending overflow and damage; that notwithstanding such knowledge, and although notified of the then condition of said river, and of the obstruction and threatened overflow as aforesaid, and warned then of the probable consequences of permitting such obstruction to remain, and then it being practicable for the defendant to have removed said obstruction, and thereby to have prevented the gorge and overflow and damage to plaintiff that followed, with little expense, within not exceeding one day's time, and before any considerable overflow was caused or any considerable damage was done, with but slight injury to said bridge; yet the defendant neglected and refused to remove said obstruction, or to make a sufficient opening in said bridge to allow the ice and water of said river to flow in the natural channel thereof; that as the direct, natural, and probable result of permitting said bridge and approaches to remain as an obstruction in said river, as aforesaid, a large ice gorge, at said last mentioned date, commenced to form at said bridge and approaches, and so did form and continue for twenty-four days, of sufficient height and strength as to completely turn the entire flow of ice and water running in said river, against, over, and through the said north bank of said river, at and above said bridge, and above the plaintiff's said lands, and to cause the said ice and water of said river to rush and flow with great force, depth, and violence, over the plaintiff's said land and the surrounding lands, for many miles in extent, and so continue for twenty-four days, and until the pressure of ice and water against said bridge broke through and carried away a portion of the same, when said ice and water immediately receded and flowed down the natural channel of said river; that by reason of said ice and water being forced over and through said north bank, as aforesaid, and the ice and water, with great force, depth, and violence, rushing and flowing over the plaintiff's said lands as afore-

said, and over the surrounding lands as aforesaid, the plaintiff's said lands, and the lands surrounding the same for many miles in extent, were inundated and overflowed for the space of twenty-four days, and thereby and in consequence of said ice gorge and obstruction, and wrongful and unlawful and improper erection and construction of said bridge and approaches, the plaintiff was greatly injured and damaged in this, to-wit: His said cultivated farm land of 125 acres was stripped of its soil over its entire extent, and the same was gullied out in places, and ridges of sand formed in places thereon, and large deposits of sand spread over the whole of it, so as that the said 125 acres, which was good farming land at the time of said overflow, was by the said overflow greatly injured and rendered unproductive, to the plaintiff's damage, in this behalf, of \$625; his said meadow and pasture land of 134 acres was stripped of its soil over its entire extent, its grass killed out, its surface gullied out and ridged, and the whole covered with a deep deposit of sand, and the natural forest trees growing on a portion of said pasture land were broken down, rooted up, and destroyed, to the plaintiff's damage, in this behalf, \$767.50; his fencing on said land, to the extent of 480 rods of fencing, was broken down and washed away and destroyed, to his damage, in this behalf, \$720; his corn in field on his said lands, to the amount of 1,000 bushels, was washed away and destroyed, to his damage, in this behalf, \$200; his hogs to the number of 20, his cattle to the number of 18, and his horses to the number of 7, were forced from their stalls, feed yards, and shelters, and exposed to cold storms, and to stand in snow, ice, and water, for twenty-four days, without regular feed and care, and greatly reduced in flesh and condition, and injured to plaintiff's damage, in this behalf, \$400; his hay on said lands to the amount of 10 tons was wet and destroyed, to his damage in this behalf, \$30; his labor and expense in endeavoring to save and care for said animals

and preserve his said property from the consequences of said overflow, amounted to not less than \$100, to his damage in this behalf, \$100; and the plaintiff, in consequence of said overflow, was otherwise put to great expense, trouble, inconvenience, and hardship, and that the plaintiff's entire losses and damages in the premises are \$2,842.50. Wherefore the plaintiff prays judgment against the defendant for the sum of \$2,842.50 damages, and costs."

The plaintiff in error contends that there is no sufficient allegation that the bridge was negligently constructed, and that it forms an unlawful obstruction in the Platte river. The allegations in the petition as to the negligent construction of the bridge, and that it forms an unlawful obstruction in the river, are not as definite as they might be made, but under the liberal rules of construction of the code they will be held sufficient to justify a recovery.

The plaintiff in error contends that the insertion of the words "or damaged" in section 21, Art. I. of the constitution of 1875, restricts the right of recovery to such damages as reasonably may have been anticipated at the time the structure was erected. The rule contended for was not taken into consideration by the constitutional convention in amending the section named. It is a matter of regret that the proceedings of the constitutional convention were not published, but it is a matter of unwritten public history of the state that the section above quoted was reported by the committee having it in charge without the words "or damaged" inserted therein, and the words "or damaged" were inserted in open convention, on motion of a member, to cover a class of cases not embraced in the former section, as where no property of the party injured had been taken. It was intended to furnish an additional remedy, not to curtail or restrict any right which previously existed, and the language will not warrant the narrow construction contended for. This action is brought to recover damages for a bridge alleged to be negligently and unlaw-

fully constructed by the plaintiff in error across the Platte river, so as to form an unlawful obstruction and create a nuisance. In such case there could be no recovery until actual damages had been sustained. Thus, suppose the owner of the land at the time the bridge was built had brought an action, could he have recovered for anticipated overflows? We think not. There must be actual injuries resulting from the unlawful obstruction to justify a recovery. *Miller v. Keokuk & D. M. R. R. Co.*, 16 N. W. R., 567. *Drake v. C., R. I. & P. R. R. Co.*, 19 N. W. R., 215. *Cain v. C., R. I. & P. R. R. Co.*, 3 N. W. R., 737.

But it is contended that the plaintiff below being the grantee of Ballou, who owned the land when the bridge in question was constructed, the present owner cannot, therefore, recover. This position, however, is untenable. If the bridge in question is a nuisance and unlawful obstruction in the river, then every continuance of such nuisance is a new nuisance, for which, when damages have been sustained, an action may be maintained, the recovery being limited to such damages as have accrued before the action was brought. *Beswick v. Cunden*, F. Moore, 353. *Cro. Eliz.*, 402. *Penruddock's Case*, 5 Co. Rep., 102. 3 Bla. Com., 220. *Rosewell v. Prior*, 2 Salk., 460. *Fay v. Prentice*, 1 C. B., 828. *Bowyer v. Cook*, 4 Id., 236. *Holmes v. Wilson*, 10 Ad. & El., 503. *Thompson v. Gibson*, 7 M. & W., 456. *McConnel v. Kibbe*, 29 Ill., 483. S. C., 33 Id., 175. *Staple v. Spring*, 10 Mass., 72. *Hodges v. Hodges*, 5 Met., 205. *Baldwin v. Calkins*, 10 Wend., 167. *Beidelman v. Faulk*, 5 Watts, 308. *Blunt v. McCormick*, 3 Denio, 283. *Cumberland, etc., Corp. v. Hitchings*, 65 Me., 140. *Thayer v. Brooks*, 17 Ohio, 489. *Beach v. Crain*, 2 N. Y., 86. 1 Sutherland Damages, 202. Gould on Waters, sec. 387.

It is said, however, that one recovery will bar a future action. This, in many cases, no doubt, is true, as if a railroad had been constructed along a street in front of the

plaintiff's property, whereby he sustained damages, one recovery would bar a future action for the same injury. But where damages result from a continuing nuisance a different rule applies, and a recovery may be had for each injury as it occurs. There was no error, therefore, in overruling the demurrer, and the judgment of the court below is affirmed.

JUDGMENT AFFIRMED.

REESE, J., concurs.

COBB, J., dissenting.

I cannot concur in the conclusion of the majority of the court, or the reasoning of the chief justice by which it is reached. The case of *O. & R. V. R. R. Co. v. Brown*, 14 Neb., 170, was an action for damages alleged to have been caused by the same bridge involved in the case at bar, in the spring of 1881. In that case the trial court instructed the jury: "That, notwithstanding the fact that the railroad company, when it constructed its bridge, did so in a prudent manner, according to the best information it could obtain at the time of its construction, yet, if it subsequently appeared that its construction was such that damages would result from the gorging of ice against the bridge, and that damages would result to the plaintiff and other property-holders in the vicinity of the bridge by reason of the overflow of ice and water in consequence of said gorge, and the defendant had time and opportunity and means, by a reasonable effort on its part in that behalf, to avoid or prevent such damages, it was its duty so to do, and it was required to use all such reasonable effort to avert such damages, and, if it failed so to do, it is liable to plaintiff for the damages sustained by him as resulted directly from such failure." This court held the above instruction to be erroneous, and for that reason reversed the judgment of the district court.

As I understand the petition in the case at bar, the *gravamen* of the charge against the railroad company is not the unskillful or negligent manner in which it built the bridge, but its negligence in failing to remove it or change its construction when the ice gorge was threatened, and it was notified thereof. If I am correct in this, and the instruction in the case above cited was wrong, and this court justified in so holding, then the petition in the case at bar fails to state a cause of action.

But if it was the object of the pleader to attack the original construction of the bridge, I do not think the petition sufficiently intelligible as to whether it seeks to charge the railroad company with negligence in building a bridge at the point where they did, or in building the kind of a bridge which they did.

The majority of the court, I think, understand the petition to charge the railroad company with keeping and maintaining a nuisance in the bridge in question. Of course, no one will contend that a railroad bridge across the Platte river, at or near the site of this one, is a nuisance *per se*, or that it is not a great public necessity. Accordingly, I think that if it was the object of the pleader to charge the railroad company with the erection of a bridge in such a negligent and faulty manner as to be a nuisance, the petition should state by what fault of construction, which in the nature of things could have been avoided, the bridge became a nuisance. My own view is, that if in planning and constructing the said bridge, the railroad company brought to its execution the engineering knowledge and skill ordinarily practiced in such works, and such knowledge and skill were practically applied to the building of said bridge, if the property of any person was damaged, or became liable to damage, so that its value was depreciated by reason of the erection of such bridge, the case comes within the provision of the constitution referred to in the opinion of the chief justice; that such damage should

be compensated once for all, and that such bridge is not a nuisance. And I think that the burden of pleading, at least, was upon the plaintiff below, to show that the said bridge did not come within the above terms.

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27	499

OMAHA & REPUBLICAN VALLEY RAILROAD COMPANY,
PLAINTIFF IN ERROR, V. ABBIE BROWN, DEFEND-
ANT IN ERROR.

MAXWELL, CH. J.

The questions involved in this case are the same as those in the *Omaha & Republican Valley R. R. Co. v. Standen*, just decided, *ante* p. 343, and the same judgment will be entered.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

REESE, J., concurred.

COBB, J., dissented.

PAUL NEWMAN, PLAINTIFF IN ERROR, V. THE STATE
OF NEBRASKA, DEFENDANT IN ERROR.

Practice in Criminal Cases: CONTINUANCE. Plaintiff in error was prosecuted upon information filed by the district attorney, charging, in two counts, the forging, and uttering as true and genuine, a promissory note. The information was filed on the 11th day of October. He was placed upon his trial on the 19th day of the same month. Prior to the day of trial he filed a motion for a continuance, and which was supported by his affidavit, in which

it was alleged that he could prove by four witnesses, naming them, all non-residents of the state and none of whom were present, that the notes were placed in his hands for the purpose of sale by one B., and that, as requested, he sold the notes simply as an accommodation, and returned all the money to the person for whom the sale was made; the residence of two of the witnesses out of the state was given, so that their depositions might be taken. The proposed evidence being material, and sufficient time for procuring their deposition not having elapsed, it was *Held*, That the district court erred in overruling the motion for a continuance.

ERROR to the district court for Washington county.
Tried below before NEVILLE, J.

Jesse T. Davis, for plaintiff in error.

William Leese, Attorney General, for the state.

REESE, J.

Plaintiff in error was convicted of the crime of uttering and publishing, as true and genuine, a forged and fraudulent promissory note. The prosecution was upon an information, consisting of two counts, the first, for the forgery of the note, the second, for uttering the same. The jury, by their verdict, found him guilty, as charged, in the second count of the information. Of the questions presented, it is deemed necessary to notice but one, as a majority of the court are of the opinion that upon it alone a new trial must be granted. This assignment is, that the court erred in overruling plaintiff's motion for a continuance.

It appears by the record that the promissory note alleged to have been forged was dated September 7th, 1886. It was sold on the 20th of the same month. On the 24th, plaintiff in error was arrested, and placed in jail, where he remained until the 11th of October, when the information was filed against him, and he was placed

upon trial on the 19th of the same month. Prior to the trial, he filed a motion and affidavits for a continuance, by which he sought to show the absence of witnesses material to his defense, and whom he could not procure in time for the trial. His line of defense was, that just before he sold the forged instrument he was in Fremont with his wife, and was contemplating a trip to Blair, on business. At this time, one Bradley, with whom he was acquainted, approached him, and asked him to take some notes to Blair, sell them for him, and return him the money, and that he did so, under the honest belief that the notes were true and genuine, and without any fraudulent intent. In his affidavit, by which the motion for a continuance is supported, he deposed that one — Parsons, who resides in the city of New York, at "1180 Canal street," J. C. Moore, whose residence is not disclosed, I. B. Davis, whose residence is in Kansas, but whose post-office address was not then known, and Anna Newman, the wife of affiant, who resided in Marysville, Missouri, were present with him at the Eno hotel, in Fremont, at the time the notes were delivered to him, and saw their delivery, and heard the request and instructions from Bradley, together with a statement as to where the makers of the notes resided, and the consideration for which they were given. That Anna Newman was present in Fremont when he returned, and saw him pay over to Bradley, without charge or deduction, the sum of four hundred dollars and fifty cents, the proceeds of the sale of notes. It is averred that there were no other witnesses by whom these transactions could be proved, and that, by reason of his poverty, and the short time intervening between the filing of the complaint and the day set for trial, he was unable to procure the desired testimony. For the purposes of a decision upon a motion for a continuance, the statement of the affidavit must be taken as true, and cannot even be contradicted by counter affidavits. *Hair v. State*, 14

Neb., 503. Assuming, as we must, that the allegations contained in this affidavit were true, no question can arise as to the materiality of the evidence set out. The only inquiry, therefore, can be as to the diligence of plaintiff in error in securing this testimony in time for the trial. It was believed by the writer that there was not sufficient showing to warrant the court in finding that the testimony of the witnesses could be procured by a subsequent term. The residence of two of the witnesses was not given, and there is nothing in the affidavit which would lead any one to suppose that their testimony could be had at a later day, but the residences of Anna Newman and of Parsons are given, and if the statements concerning them are true, their testimony could be had by depositions, under the provisions of section 462 of the criminal code.

The time intervening between the filing of the information and the commencement of the trial would have been clearly insufficient, under any degree of diligence, to have procured the presence of Parsons, or his deposition, and insufficient to procure the deposition of Anna Newman. Both witnesses being without the state, their attendance could not under any circumstances have been coerced. Plaintiff in error was, therefore, guilty of no negligence, so far as the testimony of these witnesses was concerned, the statute above referred to not permitting the taking of a deposition until after issue joined by the plea.

For this error, the judgment of the district court must be set aside and a new trial awarded.

The judgment of the district court is reversed, and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

SINGER MANUFACTURING COMPANY, PLAINTIFF IN
 EROR, V. McALLISTER BROTHERS, DEFENDANTS
 IN ERROR.

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36	635
23	359
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1. **Pleading: ANSWER: WAIVER.** The filing of an answer by which issue is joined upon all the averments of the petition, is a waiver of exceptions to the decision of the court in overruling a special demurrer.
2. **Depositions: AUTHORITY OF NOTARY PUBLIC.** The fact that a notary before whom a deposition is taken has his office in a room occupied by the attorneys who represented the party taking the deposition, is not of itself sufficient to warrant the exclusion of the deposition when offered to be read upon the trial. The practice of taking depositions in the office of an attorney interested in the cause is objectionable, yet there is no law to prohibit it.
3. **Continuance.** A motion for a continuance is addressed to the sound legal discretion of a court, and its decision thereon will not be reversed unless there has been an abuse of such discretion.
4. ———. Where an affidavit in support of a motion for a continuance on account of the absence of a document necessary to be used in the cause as evidence is filed, it should affirmatively appear thereby, not only that the party seeking the continuance has been diligent in trying to procure such document, but that it is at least probable that the evidence can be had in case the adjournment should be granted.

ERROR to the district court for Platte county. Tried below before POST, J.

J. M. McFarland, for plaintiff in error.

McAllister Bros., *pro se*.

REESE, J.

Defendants in error filed their petition in the district court, in which they allege that in 1883 one F. J. Swartz

was employed by plaintiffs in error as traveling salesman for the purpose of selling sewing machines; and that during the year he sold a large number of such machines, so that by the first day of November of that year plaintiff in error was indebted to him in the sum of \$499. The assignment of the claim to defendants in error is alleged in the usual form, and judgment is demanded. To this petition plaintiff in error filed a demurrer, which was overruled, whereupon an answer to the merits was filed.

It is alleged here that the district court erred in overruling the demurrer, but this question cannot be noticed as the filing of the answer waived any exceptions to this ruling. *Farrar & Wheeler v. Triplett*, 7 Neb., 237.

It is contended that the court erred in overruling plaintiff's exceptions to the deposition of the witness Swartz. This deposition was taken at the office of and before P. L. Pollock, a notary public in the city of Denver, Colorado. These exceptions were based on the alleged fact that the notary was interested in the suit, and that this interest was in behalf of defendants in error, and that he was attorney for defendants in error, and for the further reason that he was in the employ of Sampson & Millett, the attorneys who represented defendants in error in taking the deposition. Attached to this motion and made a part of the record is the affidavit of Swartz, to the effect that prior to the taking of the deposition the notary saw the witness in the interest of defendants in error and talked over the material facts as to what he would testify to, and that the notary was an attorney at law and works for and has been working for Sampson & Millett, the attorneys named, and for the further reason that the depositions were taken at their office.

The substantial facts stated in these affidavits are, that the notary had his office in the same room with Sampson & Millett, and that prior to the taking of the deposition he saw witness and had a conversation with him as to what

his testimony would be. Whether he sought to influence that testimony in any degree is not shown.

It is true, it is said, that he saw the witness "in the interest" of the defendants in error, but this as a statement of fact is insufficient. If anything improper was said to the witness it should have been stated in the affidavit instead of the mere conclusion.

As there is no proof of any prejudice to the plaintiff in error, the ruling of the district court was correct. The practice of taking depositions in the office of an attorney in the cause wherein the deposition is taken, should not be encouraged (*Payne v. Briggs*, 8 Neb., 79), yet we know of no law by which it is prohibited.

It is next insisted that the court erred in admitting in evidence parts of certain documents which it appears were introduced by defendants in error.

These objections cannot be considered for two reasons: 1st. There was no exception taken to the ruling of the court. 2d. The entire documents were afterwards introduced by plaintiffs in error, and admitted. Assuming that there may have been error in the first ruling, it was effectually cured by the subsequent action of plaintiff in error.

During the trial, plaintiff in error sought to introduce in evidence a contract entered into between it and one Shoff, its agent, and presumably the person by whom Swartz was employed. The contract was identified by Shoff as being a duplicate copy, and was offered in evidence. Defendants in error cross-examined him as to the genuineness of this instrument. He then testified that the instrument was not a duplicate, but was a copy of the contract, instead of the original. He at first testified that the signature was his own handwriting, but finally said that it was not. The copy was offered in evidence and excluded.

Plaintiff in error then filed a motion for a continuance, supported by affidavits, by which he sought to continue the cause on the ground of surprise, which ordinary prudence

could not have guarded against. The motion for continuance was overruled, and the trial proceeded. The affidavit in support of the motion was to the effect that it was necessary to show that Shoff was a special agent of plaintiff in error, not having general authority, and that it was material to show what authority Shoff had to employ Swartz as the agent of plaintiff in error, and that prior to the time of trial he had delivered the instrument to the attorney for plaintiff in error, believing it to be a duplicate of the original contract. It was sought to continue the cause until the original or duplicate could be procured. In this ruling of the court we see no error. There is no good reason assigned why Shoff might not have procured the original instead of the copy. Neither is it shown where the original was at the time of trial, nor that it could be obtained, should the continuance be granted. While it is said in the affidavit that the attorney for plaintiff in error used every diligence to get the original contract, yet there is no showing as to what this diligence consisted of, nor what efforts were made.

The motion for a continuance is directed to the sound discretion of the court, and its rulings will not be reversed, except for an abuse of such discretion. There is nothing in the record to show such abuse. *Jameson v. Butler*, 1 Neb., 119. *Billings v. McCoy*, 5 Id., 190. *Johnson v. Dinsmore*, 11 Id., 394. *Williams v. State*, 6 Id., 337. *Ingalls v. Noble*, 14 Id., 273. We cannot, therefore, see that the court erred in its rulings.

Objections are made to matters occurring upon the trial under the supervision of the court, but as it is not perceived that anything was done to the prejudice of plaintiff in error, they need not be noticed, as error can never be presumed, but must appear of record.

No error affirmatively appearing of record the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

WILLIAM H. HAMMOND, PLAINTIFF IN ERROR, v.
SHERMAN S. JEWETT & Co., DEFENDANTS IN
ERROR.

1. The Evidence examined, and Held, Not sufficient to sustain the verdict of the trial jury.
2. Verdict. Where an issue is presented by the pleadings, the verdict of a jury thereon cannot be sustained, unless supported by some evidence.

ERROR to the district court for Clay county. Tried below before MORRIS, J.

Dilworth & Smith and *W. P. Shockey*, for plaintiff in error.

Leslie G. Hurd, for defendants in error.

REESE, J.

This action was commenced before a justice of the peace of Clay county. Such proceedings were had as resulted in a removal of the cause to the district court by appeal, where new pleadings were filed and a trial had, resulting in a judgment in favor of defendant in error and against plaintiff in error.

The allegations in the petition are, that plaintiff in error was a local dealer in stoves and hardware in the town of Harvard, and was the agent of defendants in error for the sale of their stoves; that through plaintiff in error, as such agent, defendants in error sold a stove to one Goehring for the sum of \$70; that the sum of \$50 of the purchase price of the stove had been paid to the plaintiff in error, but that he had failed to pay the same over to defendants in error, and that there were \$54.48 due to defendants in error.

Plaintiff in error, by his answer, substantially admits the sale of the stove through him as agent, but alleges that the same was paid for to him by Goehring, and that on the 13th of October, 1878, he paid to defendants in error the whole amount due and owing to them growing out of such sale.

The reply was a general denial.

The only question involved in the case is one of payment; for plaintiff in error and Goehring, in their testimony, both state unequivocally that the stove was purchased through plaintiff in error, as alleged, and paid for by Goehring. We have examined the record and the testimony carefully, and are forced to the conclusion that the verdict is contrary, not only to the weight of evidence, but to the whole thereof.

W. P. Webster, the traveling agent of defendants in error, by whom the stove was sold, testified to its sale and shipment, and states unequivocally that he has no knowledge as to whether the debt had been paid or not; that he is not the bookkeeper of defendants in error, nor is he the cashier, and does not have access to the books of the defendants in error, and only depended upon the statements given him by them for collection. When asked if the debt had ever been paid, his answer was, "It has not, to my knowledge. Of course I have not full knowledge of these things."

It will not serve any good purpose to give a critical examination of his testimony. It is fair to say that throughout the whole of his examination there is no proof whatever that the debt has not been paid. It is quite probable that by the issues the burden of proof did not rest upon the defendants in error to establish the negative of this proposition by a preponderance of testimony; but it appears that they assumed this responsibility upon the trial of this question. Plaintiff in error, upon the witness stand, testified positively and unequivocally that he had paid the

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debt by a draft sent to defendants in error at their place of business, in Chicago, Illinois. He testifies with Goehring as to the time of the payment of the money to him by Goehring, and that immediately thereafter, or, at any rate, within a short time, he forwarded to defendants in error a draft for the full amount due upon the stove.

We here quote a part of his testimony :

Q. You may state to the jury whether or not you have paid the plaintiffs for that stove?

A. Yes, sir; I paid them for it and got their receipt.

Q. Have you the receipt for that with you now?

A. No, sir; I got it burned up when I burned out. There were several of these. After I lost the receipt I sent to Chicago to get a statement from the house.

Q. Look at that paper (referring to paper marked exhibit A), and state whether or not this is the return?

A. Yes, sir, that is it; the stove is charged \$50, four months' time. On October 31st, 1878, I have credit for \$50.

Q. That is the credit it speaks about for the stove?

A. Yes, sir, that is it.

He also testifies that the \$50 payment made to him was paid directly upon this purchase.

In his cross-examination he is asked the question, "You sent the house \$50 on this stove?"

A. Yes, sir.

Q. And Jake (meaning Goehring) paid you \$50?

A. Yes, sir, and I sent them a draft for \$50.

There is no conflict of testimony upon this subject. Webster was again called to the stand but did not contradict any of this testimony. In fact it was wholly and entirely uncontradicted. The statement referred to as having been sent to plaintiffs in error by defendants in error, shows the charge for the stove to have been made on the 24th day of July, 1878, and a credit of \$50 on the 31st day of October of the same year.

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The answer of plaintiff in error squarely and fully presented the issue of payment. No preparation seems to have been made, by deposition or otherwise, to meet this issue on the part of defendants in error. It is shown by the witness (Webster) that another person than himself had charge of the books and doubtless could have testified as to whether payment had been made or not.

This is not a case of conflicting testimony; therefore, the well established rule in this state, that a verdict upon conflicting testimony will not be molested, can have no application. There was, it seems, a total absence of negative proof on the part of defendants in error, and therefore the verdict in their favor cannot stand.

The judgment of the district court is set aside and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

JUDSON N. POLLARD, PLAINTIFF IN ERROR, V. JEANNETTE N. TURNER, EXECUTRIX OF THE ESTATE OF BYRON H. TURNER, DECEASED, DEFENDANT IN ERROR.

1. **Evidence:** BOOKS OF ACCOUNT are receivable in evidence only when they contain charges by one party against the other, and then only under the circumstances and verified in the manner provided by statute. *Van Every v. Fitzgerald*, 21 Neb., 36.
2. **Error.** It is not every error that calls for a reversal of a judgment. To have this effect the error must appear to have been prejudicial to the party seeking to take advantage of it. *Dillon v. Russell*, 5 Neb., 484.

ERROR to the district court for Fillmore county. Tried below before MORRIS, J.

Eller & Sloan and *John Barsby*, for plaintiff in error.

A. A. Whitman, for defendant in error.

REESE, J.

This was an action for the value of a windmill alleged to be the property of defendant in error, but wrongfully converted by plaintiff in error to his own use.

Plaintiff in error admitted by his answer that he had the windmill in his possession, but alleged that he was the owner thereof; that prior to the death of Byron H. Turner he had purchased the property of him and paid him for it. A trial was had to a jury who, by direction of the court, returned a verdict in favor of defendant in error. Plaintiff in error, who was defendant below, brings the cause to this court by proceedings in error.

The questions presented will be noticed in their order.

Plaintiff in error took the witness stand in his own behalf. It being incompetent for him to testify to the transaction by which it was claimed he purchased the windmill of the deceased, he sought to introduce his cash book, showing the payment of \$55 in cash, and the transfer of a note on J. B. Wescott for \$35. His testimony and the book were objected to, and both were excluded.

It is urged that both rulings were erroneous. As we view the case, the decision must depend entirely upon the admissibility of the cash book. If it was incompetent for any purpose, it would follow that the ruling of the court upon the testimony offered for the purpose of identifying it could not be material in the final determination of the case.

The book referred to is proven sufficiently, perhaps, to be the cash book of plaintiff in error. The page introduced in evidence is a list of the items of money paid by him for various purposes. On the upper line occurs the

words, "Paid out." It contains no items of charges to any persons, but seems rather to be a memorandum of money paid out, such as the following first three items:

Telephone rent	\$ 3.50
Feb. 1, clerk hire.....	40.00
Feb. 1, freight bills.....	7.63
Etc.	

The only authority of which we have any knowledge—aside from the common law rule, which is superseded—is section 346 of the civil code, which is as follows: "Books of account containing charges by one party against another, made in the ordinary course of business, are receivable in evidence only under the following circumstances, subject to all just exceptions as to their credibility: "*First*, The books must show a continuous dealing with persons generally, or several items of charges at different times against the other party in the same book. *Second*, It must be shown by the party's own oath or otherwise that they are his books of original entries. *Third*, It must be shown in like manner, that the charges were made at or near the time of the transaction therein entered, unless satisfactory reasons appear for not making such proof. *Fourth*, The charges must also be verified by the party or the clerk who made the entries, to the effect that they believe them just and true, or a sufficient reason must be given why the verification is not made."

It is not deemed necessary to enter into a discussion of any of the provisions of this section, as this was fully done in the opinion written by Judge COBB in *Van Every v. Fitzgerald*, 21 Neb., 36. It is sufficient to say that the book referred to was not shown to be the book of original entries of plaintiff in error, nor does it show a continuous dealing with persons generally, or several items of charges at different times against the other party. It was simply a private memorandum, evidently kept by plaintiff in error

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for the purpose of enabling him the better to remember his expenditures and for what purpose they were made. The book itself being inadmissible in evidence, it could serve no good purpose to examine plaintiff in error as to when or under what circumstances the entries were made.

On the oral argument it was urged that the trial court erred in admitting in evidence a part only of a stipulation entered into by the attorneys without requiring the whole to be read to the jury. This stipulation is as follows:

"It is hereby stipulated by and between the parties to this suit that, for the purpose of this trial, the following facts are hereby admitted by both parties, to-wit: "That one J. B. Wescott, on or about the second day of February, 1884, made and delivered a certain promissory note for the sum of thirty-two dollars, with interest at ten per cent from date, due about August 2d, 1884, and delivered the same to one C. D. Lindley, and that on the same day the said C. D. Lindley sold the same to the defendant in this case.

"It is further agreed that the windmill in question is of the value of eighty-five dollars."

The clause which was admitted was the last paragraph, in which it was agreed that the value of the windmill was \$85. Suppose that part of the stipulation excluded had been read to the jury, what benefit could plaintiff in error have derived therefrom? Most clearly, none. There was no proof that he had transferred the note to the deceased, and if there had been, the fact that the windmill was the consideration for such transfer was clearly wanting, and could not have been supplied by any testimony which was offered. This being true, no prejudice could result to plaintiff in error, even were the ruling technically erroneous.

This must also apply to another stipulation, offered and excluded, by which it was agreed that Wescott, if present, would testify that the deceased showed him the note re-

ferred to and stated that he had received it from plaintiff in error in a trade. This would still fall short of proving or tending to prove that the note was given in part payment for the windmill. This proof being entirely wanting, it could not have bettered the condition of plaintiff in error had the stipulation been admitted in evidence, and the verdict would still have had to be in favor of defendant in error.

The judgment of the district court must therefore be affirmed, which is done.

JUDGMENT AFFIRMED.

THE other judges concur.

LOUIS P. LARSON, APPELLEE, V. MARTHA BUTTS,
APPELLANT.

1. **Homestead.** A contract to convey a homestead, entered into by a wife in her own name, will not be specifically enforced, as the statute requires the instrument of conveyance to be signed and acknowledged by both husband and wife.
2. ———. The fact that the husband and wife are not living together at the time the contract was made, will not render her contract for the conveyance of the homestead valid.
3. A decree against the clear weight of evidence will be set aside.

APPEAL from the district court of Dodge county.
Tried below before POST, J.

U. Hollenbeck and *Frick & Dolezal*, for appellant, cited: *Donner v. Redenbaugh*, 16 N. W. R., 127. *Thimes v. Stumpff*, 33 Kan., 53. *Stout v. Rapp*, 17 Neb., 462. *Dennis v. Omaha National Bank*, 19 Id., 675. *McGoon v. Ankery*, 11 Ill., 558. *Judson v. Malloy*, 40 Cal., 299.

22	370
36	382
22	370
36	578
22	370
39	674
22	370
51	98
59	63

Bradshaw v. Hurst, 11 N. W. R., 672. *Ott v. Sprague*, 27 Kan., 620.

E. F. Gray, for appellee, cited: *Anderson v. Kent*, 14 Kan., 207. *Kimball v. Wilson*, 13 N. W. R., 748. *Newman v. Franklin*, 28 Id., 579. *Williams v. Moody*, 28 Id., 510.

MAXWELL, CH. J.

The plaintiff brought an action in the court below for specific performance of contract, and alleged in his petition "that defendant, Martha Butts, on the 19th day of June, 1886, being the owner, in fee simple, of the premises hereinafter described, sold and agreed to convey the same to the plaintiff, Louis P. Larson, and then executed in the name of M. W. Butts and delivered to him an instrument in writing, in words and figures following, to-wit:

"NORTH PLATTE, NEB., June 18, 1886.

"Received from L. P. Larson the sum of fifty dollars, as part payment of lots seven and eight in block 184, city of Fremont, Dodge county, Nebraska. Each lot is 66 by 132, besides the alleys, which are also included. The purchase price is thirty-seven hundred and fifty dollars less a mortgage of one thousand dollars, with interest, to be deducted. This does not include the houses, which I agree to remove in the spring of 1887, as soon as the frost is out of the ground. The deed, free of all incumbrances except as above, I agree to deliver to said L. P. Larson, between June 21, 1886, and July 1, 1886, upon payment of balance due me in cash, less \$250, which amount is to be paid next spring without interest.

"M. W. BUTTS."

That at the same time plaintiff paid defendant \$50, as a part purchase price, as in said instrument recited, and on the 25th day of June, 1886, before the commencement of

this action, tendered to said defendant the sum of \$2,406.56, the same being the balance of the purchase price of said lots, after deducting the principal and interest of the mortgage set forth in said instrument, and the \$250 in said contract mentioned as payable next spring, and also tendered then to defendant his promissory note for said \$250, payable without interest on the 1st day of March, 1887, as was agreed he might do, and requested her to convey said premises to plaintiff according to the terms of said agreement, but defendant refused and still refuses to execute and deliver such conveyance, and said defendant has been and still is trying, and proposes and intends to sell and convey said premises to persons other than plaintiff in violation of said agreement, and upon request declared she never would convey said premises to plaintiff."

There are other allegations to which it is unnecessary to refer.

The defendant, in her answer, alleges: 1st. "That defendant is a married woman, having a husband now living in this state, named P. O. Butts; that the property in plaintiff's petition described, now is, and has been, owned, used, and occupied by defendant, as a homestead, for the past fifteen years; that defendant has no other home for her family and herself, except the two lots described in the agreement set forth in said petition; that said premises are now, and were at the time of the making of said agreement, occupied as a homestead by defendant and her family, consisting of herself and her minor daughter, Ada West, a child by former marriage, and defendant has never left said premises, except for temporary purposes, and has never intended to permanently abandon the same; that her said husband, P. O. Butts, has no home or homestead, except as above stated. Defendant avers that by reason of the foregoing premises said receipt or agreement, set forth in said petition, is void in law and of no effect whatever; that defendant has ten-

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dered to plaintiff said \$50 paid her by him, and that she is now ready and willing to pay plaintiff said sum of \$50. 2d. That defendant occupies said premises, and holds the same under and by virtue of a deed of trust from her former husband, Gideon West, for certain specific uses and purposes therein expressed, and defendant has no other right, title, or interest in and to said premises, except such as is created by said deed; that by the terms of said deed defendant has no authority or right to sell or convey said premises, except for the purpose of paying the debts of said Gideon West, or for the purpose of supporting the children of said Gideon West and defendant until said children become of age, and paying taxes on certain other property; that neither the conveyance demanded of the defendant, nor the agreement set forth in said petition, are intended or made to carry out the purposes, or any of them, expressed in said deed of Gideon West, and the children of said West are not of age."

There are other allegations in the answer to which it is unnecessary to refer.

The reply substantially denies the facts stated in the answer.

On the trial of the cause, the court rendered a decree of specific performance, from which the defendant appeals to this court.

The undisputed testimony shows that the defendant is a married woman, but that her husband has not lived with her for two or three years last past. No divorce has been obtained, however, and for aught that appears, there is nothing to prevent them living together as husband and wife. The undisputed testimony also shows that at the time the contract was entered into, and for a long period before that time, the defendant had her residence on the lots in question, where her minor daughter, Ada West, resided, and that it was *her* home. The defendant also testifies that that was her home, although she was tem-

porarily absent at various points selling goods, particularly at North Platte, where she seems to have rented a room and sold millinery goods; the testimony also tends to show that she filed a petition in the district court of Lincoln county for a divorce from her husband, in which she alleged she was a resident of Lincoln county. No decree was obtained on the petition, however, and so far as appears, the allegations in the petition are merely formal, and can scarcely be said to be an admission of the fact that she was a resident of that county. In any event, it was a mere circumstance to be considered with others to determine the question of her residence. There are, also, certain admissions alleged to have been made by her as to her residence in North Platte. There is no denial, however, except inferentially, by the admissions heretofore referred to, of her testimony, that during all the time mentioned her home was upon the lots in question, and no denial whatever that her daughter, above named, was residing there, and that it was her home. This, in our view, is decisive of the case, the defendant being a married woman, could not, under the statute, convey her homestead, unless her husband joined with her in signing and acknowledging the same instrument. Comp. Stat., Chap. 36, Sec. 4. *Aultman & Jenkins*, 19 Neb., 211. *Swift v. Dewey*, 20 Neb., 107. *Bonorden v. Kriz*, 13 Neb., 121. The fact that the husband and wife are not living together, does not change the rule.

The second point in the answer need not be considered. The judgment of the district court is reversed, and upon defendant paying to the clerk of this court the sum of \$50, for the use of the plaintiff, the action will be dismissed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

FREDERICK W. ROTTMANN ET AL., APPELLANTS, V. H.
H. BARTLING ET AL., APPELLEES.

1. **Religious Society: SCHISM: JURISDICTION OF COURT OF EQUITY.** Where there is a schism in a religious society a court of equity does not attempt to enforce the peculiar faith or doctrines of either party, though their existence and nature may incidentally be involved in an inquiry relative to the rights of such society. All that it does is to enforce the observance and execution of an ascertained trust.
2. ———: **SEPARATION.** Where a separation has taken place, a court in determining the question of legitimate succession will adopt the rules of such society, and enforce its polity in the spirit and to the effect for which it was designed.
3. ———: **CHANGE OF CONSTITUTION.** Where a church has been organized and a constitution adopted and signed by its members, under which the church has existed for a series of years, such constitution can be changed only in the manner provided therein, or by the rules or by-laws of such society; and where the constitution provides for a three months' notice of any proposed change in the constitution, a change effected without giving such notice is invalid and of no effect.
4. ———: ———: **CASE STATED.** Where certain members and officers of the Evangelical Lutheran church, without giving the notice required by the constitution and complying with its terms, joined "*Die Erste Deutsche Evangelische Zions Gemeinde*," Held, That having ceased to be members of the Lutheran Church, they were not entitled to the possession of the property of such church.

APPEAL from the district court of Otoe county. Tried below before POUND, J.

S. H. Calhoun, for appellants, cited: *Ass. Reformed Church v. Theological Seminary*, 4 N. J. Eq., 77. *Lucas v. Case*, 9 Bush, 302. *Groesbeeck v. Dunscomb*, 41 How. Pr., 302. *Ferraria v. Vasconcelles*, 23 Ill., 56. *First Presbyterian Church v. Cong. Society*, 23 Iowa, 567. *Winebrenner v. Colder*, 43 Penn. State, 244. *Perry on Trusts*, Secs. 727, 734. *Feizel v. Trustees*, 9 Kan., 592.

Frank T. Ransom and John C. Watson, for appellees, cited: *Lucas v. Case*, 9 Bush., 297. *People v. German Church*, 53 N. Y., 103. *German Reformed Church v. Seibert*, 3 Penn. State, 282. *Den v. Bolton*, 12 N. J. Law, 206. *Burrell v. Church*, 44 Barb., 282. *Miller v English*, 2 Halst. Ch., 304.

MAXWELL, CH. J.

The plaintiffs allege in their petition "that they are residents of Nebraska City in Otoe county, state of Nebraska; that on the 20th day of January, 1867, at said Nebraska City, the said First Evangelical Lutheran church in Nebraska City, Nebraska, was duly organized under the laws and regulations of the general synod of the Evangelical Lutheran church of the United States, and was then duly incorporated under the general incorporation law of the then territory, now state, of Nebraska; by the election of a board of trustees, consisting of Eli Huber, Charles C. Walbaum, F. Templin, H. H. Petring, A. F. Mollring, Frederick W. Rottmann, and John Stromer, and adopted a constitution in accordance with the rules and regulations of the general synod; that under said constitution two of said trustees are called deacons, and two of them are called elders, and two of them are called trustees, and that said officers, together with the pastor, constitute the council of said congregation, and have charge of its affairs, and control and custody of its property, and hold all the same in trust for said congregation, subject to and in accordance with the rules and regulations of said general synod; that shortly after said organization, the said congregation purchased lots one and two in block eight, as designated on the recorded plat of South Nebraska City, now a part of Nebraska City, in Otoe county, Nebraska, and during said year of 1867 erected thereon a commodious building for public worship to be therein held

according to the doctrines, beliefs, and discipline of the said Evangelical Lutheran church, and for such other purposes as said congregation might properly see fit to use said building in connection with ordinary church work of said Evangelical Lutheran Society.

"That said property was so purchased, and said church edifice so erected thereon by members of said Evangelical Lutheran church at that time, and with the further aid of certain funds furnished by the 'Church Extension Society' of the Evangelical Lutheran church of the 'General Synod of the United States,' the same being an organization of the said Evangelical Lutheran church for the purpose of aiding in the erection of church edifices in the United States for the use and benefit of congregations and organizations of said particular sect or denomination, and that the same has been so used until about the happening of the events hereinafter mentioned.

"That 'Die Erste Evangelische Zion's Gemeinde,' to-wit: The First German Evangelical Zion's congregation, is a religious organization, different and distinct from the Evangelical Lutheran church aforesaid, is not in affiliation with the general synod of said Lutheran church, nor with those who purchased said property and contributed to the price thereof, and to the erection of said church edifice, nor with the said Church Extension Society, which aided in said purchase and erection, and is not subject to the said general synod, or in any way controlled thereby; that on or about the 18th of December, 1884, the above named defendants, combining and confederating with other persons to these plaintiffs unknown, but whose names, when discovered, plaintiffs ask may be added hereto as defendants, with apt and suitable words to charge them herein, did wrongfully and fraudulently, and in violation of the rights of these plaintiffs, and other members of said Evangelical Lutheran church, undertake to unite said Evangelical Lutheran church with said First German Evangelical Zion's congre-

gation, and to take possession of said property, and to transfer the same to the possession and control of said Zion's congregation, and did at said meeting agree among themselves to change said organization to and to become a part of said Zion's congregation, and to deprive these plaintiffs and the said Evangelical Lutheran church in Nebraska City, Nebraska, of said property, and of all right, title, and interest therein, and to prevent them from worshipping therein, or otherwise using said property as and for the use of the said Evangelical Lutheran church; that on the evening of the 13th of February, 1885, at about 8 o'clock P.M. of said day, after these plaintiffs and certain other members of said Lutheran church had quietly and peaceably entered said church edifice, and were engaged in religious services, and also in holding a business meeting, and before said religious services were concluded, under the direction and temporary charge of Rev. Joseph W. Kimmel, a regularly ordained minister of the said Evangelical Lutheran church, the said Rev. J. W. Kimmel having been in writing duly instructed and authorized by the president of the Nebraska Synod of said Evangelical Lutheran church to look after the interests of said church and its property in said Nebraska City, the said defendants and their said confederates did enter said church building violently, tumultuously, and, as these plaintiffs verily believe, some of them armed, and did interrupt said meeting, and did with violence eject him, the said Rev. J. W. Kimmel, from the room, and did then and there by their violent and outrageous conduct, and by blowing out the lights with and by which said church was then lighted, stop and end said meeting, and did refuse to allow, and did actually prevent, said business meeting or said religious services from being completed, although the said Rev. J. W. Kimmel read aloud his said written authority; that said defendants and their said confederates seized the possession of said property, and still retain the same; that said defendants and their

said confederates have seized the custody and control of all the records and books of said Evangelical Lutheran church, and the keys to the said church edifice, and still retain the same, and refuse to give them up to the regular officers of said church, who are the only proper and legal custodians thereof, and they threaten to retain possession of all said property, and to prevent the said Evangelical Lutheran church from holding divine services in said building tomorrow, the 15th of February, 1885, and at all times thereafter, and claim to hold said property for the use and benefit of the said Zion's congregation, and refuse to allow these plaintiffs and the said Evangelical Lutheran church any possession of or control in any of said church property, and to prevent them from ever hereafter holding services or public worship as such Evangelical Lutheran church therein; that the mode of worship and the religious belief, in accordance with the tenets of the said Zion's church, is not the mode of worship, nor the religious belief, nor the discipline which these plaintiffs, nor the said Evangelical Lutheran church for which they are trustees, profess nor prefer and desire, nor the one for which said property was purchased and said church edifice erected, and that they have no other place of worship in said Nebraska City, nor is there any other place in said Nebraska City solemnly dedicated to public worship as these plaintiffs and said church believe that said edifice should be dedicated, nor is there another regularly ordained minister of said church now here to conduct divine worship except the said Rev. J. W. Kimmel, so far as these plaintiffs know, and that their rights in the premises demand prompt and immediate protection. Plaintiffs ask that said defendants, and all persons acting by, through, under, or in connection with them in any way, may be restrained forever from keeping these plaintiffs and the said Evangelical Lutheran church out of the possession of said property, or of the key or keys whereby access may be obtained thereto, and of the

records, books, papers, and documents of said Lutheran church, and from any longer retaining any of the property of any description which they have taken from the said organization known as the First Evangelical Lutheran church in Nebraska City, Nebraska, and from any interference with or interrupting the meetings or the worship of said church, or setting up any claim or claims as such 'Zion's congregation' to the property of said 'Lutheran church,' or from preventing these plaintiffs and the said Lutheran church from having, holding, and enjoying the sole and uninterrupted use and possession of said property, and all that pertains thereto, and for such further and other relief in the premises as shall seem agreeable to equity and good conscience."

In their answer, the defendants admit "that on the 20th day of January, 1867, the First Evangelical Lutheran church in Nebraska City, Nebraska, was duly organized, as in the petition stated, and admit the election of the persons therein named as a board of trustees, and that a constitution was adopted, as in the petition alleged, and that under said constitution two of said trustees are called deacons, and two are called elders, and two are called trustees, and that said officers, together with the pastor, constitute the council of said congregation, and have charge of the affairs and control and custody of its property, and hold the same in trust for said congregation; but deny they hold the same for said congregation, subject to and in accordance with any rules and regulations of the general synod of the Evangelical Lutheran church of the United States, and allege that the said general synod has no right, authority, or jurisdiction over the said property of said congregation, nor can said general synod dispose of the property of said congregation, nor can it prevent the said congregation from disposing of the same in any manner the said congregation see fit; admit the purchase by the said First Evangelical Lutheran church of the property

described in the petition, and that a church edifice was erected upon said property, but deny that said property was purchased or said church edifice erected through any means furnished by the general synod, or by any aid received from any church extension society, and deny that said property was purchased through any aid received from said synod or said society. They allege that said synod or said society loaned to said First Evangelical Lutheran church, money, and to secure the repayment of the same and interest, took a mortgage from said church concerning the said real estate and the church edifice thereon, and they allege the said debt was paid with interest by the said First Evangelical Lutheran church, and the said synod and the said church extension society have no longer any claim thereon; they deny that the said synod or the said church extension society furnished any money or any means to aid the said First Evangelical Lutheran church in purchasing said property, or in erecting the church edifice thereon, other than as above set forth, and deny that the said synod or the said church extension society have any right, title, claim, or interest of any kind in or to said property. They admit the said church edifice was erected as a building of public worship to be therein held according to the doctrines, beliefs, and discipline of said Evangelical Lutheran church, and for such other purpose as said congregation might see fit to use the said building in connection with ordinary church work of said Evangelical Lutheran church; that the said First German Evangelical Zion's congregation is a religious organization, as hereinafter set forth more fully, but deny that it is different or distinct from the Evangelical Lutheran church, and that it is not in affiliation with the general synod of the Evangelical Lutheran church or with those who purchased said property, and contributed to the price thereof and to the erection of said edifice.

"They deny that, on the 18th of December, 1884, or at

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any other time, that they wrongfully and fraudulently and in violation of the rights of said plaintiffs and other members of said First Evangelical Lutheran church, undertook to unite said Evangelical Lutheran church with said First German Evangelical Zion's church; that they undertook to take possession of said property, and to transfer the same to the possession and control of said Zion's church or congregation; that they agreed among themselves to change said congregation to and become a part of said Zion's congregation or church, and to deprive the plaintiffs and the said Evangelical Lutheran church of the said property, and of all or any right, title, or interest therein, or to prevent them from worshiping therein or otherwise using said property as and for the use of said Evangelical church; deny that they, on the 13th of February, 1885, or at any other time, entered the said church building violently or tumultuously and armed, and thus interrupted the plaintiffs and others when lawfully worshiping therein; deny that they prevented or attempted to prevent the plaintiffs worshiping in said church building, but admit that they prevented them from transacting any business therein; deny that they seized possession of said property, but allege that defendants were actually and lawfully in the possession of said building, and that they still lawfully retain possession of said building; deny that they seized the records, books, papers, and other property of said First Evangelical Lutheran church, and allege that defendants were in the lawful charge, possession, and custody of said properties, and still retain such lawful possession, and deny that they refuse to give up the said properties to the legal custodians, and allege that they are the legal custodians of all the property of the said First Evangelical Lutheran church of Nebraska City, and that as such they are and have had uninterrupted possession of the said church building and all other properties of said church.

"They deny that they threatened to prevent the said First

Evangelical Lutheran church from holding divine worship in said building, but allege that on the 18th day of December, 1884, they were the duly elected and acting trustees of the said First Evangelical Lutheran church in Nebraska City; that on that day a meeting had been called, pursuant to notice, for the purpose of amending the constitution of the said last-named church in the matter of the name of the church and the congregation only; that defendants, William Luecke, Albert Schnitker, and Frederick W. Rodenbrock were duly elected trustees of said Evangelical Lutheran church, and were duly installed and entered upon the duties of said offices and trust on October 28th, 1883, and under the constitution of said last-named church, their terms of office expire on November 1st, 1885; that the defendants, Adam Schafer, Herman H. Bartling, and Henry Fastenau were duly elected trustees of and for said church for the term of two years, and on the 28th day of October, 1883, were duly installed as such, and entered upon the duties of said offices; and that under the constitution and laws of said church their terms of office expire on November 1st, 1886; and that said election was duly and regularly held by said church association at the time and in the manner required by the constitution, rules, and customs of said church association, and said plaintiffs, or a majority of them, participated therein, and have acquiesced therein since the date thereof, until the date of the disturbances mentioned in the petition; that two of said defendants are trustees, two of them are deacons, and two are elders duly installed and in charge of the affairs and property of said church and are in possession of said church building and the pews and furniture therein, and of the service owned by said church, and of all books and other property belonging to the said church, and have been so in charge and possession thereof ever since the 28th day of October, 1883, at which date their predecessors in office turned the same over to them, at which time, nor ever since, has there been any

time of service, and to have the church exercises and ceremonies conducted and administered in the English language, which language is not spoken or understood at all by a portion of said congregation, and by a portion thereof is not readily understood; that to this end and with the intent to so introduce the said English language into said church, the said plaintiffs have attempted to take forcible possession of said church, and have at times broken the doors of said church building open, and without any authority the said plaintiffs have called to take the said church one J. W. Kimmel, and the said J. W. Kimmel has entered into the conspiracy with the said plaintiffs with the intent to aid and assist them in their said plot, and in pursuance of their said conspiracy the said plaintiffs, in company with the said J. W. Kimmel, proceeded to said church edifice on the 13th day of February, 1885, and with force and violence did unlawfully enter said church in the absence of defendants, the officers and trustees of said church, and in the absence of the said congregation, and that said entry and breaking were made and done in the night time, and defendants and other members of the said church association learning that such unlawful breaking and entry had been made and that it had been made with the intent to take forcible possession of said church building and the properties of said church, went to said church building while plaintiffs and the said Kimmel were in the said church, and entered the same in a peaceable manner and did not interfere or interrupt the said plaintiffs or the said Kimmel while engaged in worship, though plaintiffs and said Kimmel had no right or authority to hold services therein; that after the services were concluded the said Kimmel claimed to be the pastor of said First Evangelical Lutheran church, and he and said plaintiffs attempted and commenced to exercise the rights, duties, and functions of said church congregation and church officers, and thereupon defendants and other members of said

congregation of the said First Evangelical Lutheran church ejected and removed said plaintiffs and said Kimmel from said church building, having first requested them to withdraw from the same, and upon their refusal ejected them, using only sufficient force for that purpose; defendants deny that they or any of them were armed, nor was any one with them armed, and allege that the allegations in the petition stating any of them or any of the congregation who accompanied them were armed, are wholly and absolutely false in every particular; that the said Geo. F. Kregel, as they verily believe, was armed for the purpose of terrifying defendants and the said other members of said congregation, and was about to draw the said weapon from his pocket at the time defendants requested the said Kimmel and said plaintiffs to withdraw, when defendant Bartling cautioned him not to do so or have any trouble, whereupon said Kregel desisted and refrained from drawing said weapon; that said Kimmel has not been chosen, called, elected, or appointed by the said First Evangelical Lutheran church to act as the pastor thereof, and he and the said plaintiffs are seeking to place him, the said Kimmel, in charge of said church and said congregation, unlawfully and contrary to the rules and regulations of said church and against the wishes of said congregation; that under the rules, practice, and under the constitution governing the said congregation, whether it is called by the old or the new name, pastors for said congregation are chosen by said congregation, and no synod, whether the General Synod of the United States, or the General Synod of North America, has any authority to place any pastor over or in charge of said congregation, but the said congregation is an independent body with the right, power, and authority to choose its own pastor, preaching, practicing, and owning the faith of the Lutheran church; that under the said constitution of the First Evangelical Lutheran church, and under the constitution of the congrega-

tion thereof under the new name given to said congregation, said F. W. Rottman, said Kregel, John Teten, and Frederick W. Petring are not in good standing in said church because and for the reason that none of them have for more than two years contributed to the support of said church, though they and each of them are amply able to contribute to the support thereof, and said Myers and said Noelting are not considered members of said congregation, whether under the old or new name, and they are not members thereof as they have never been received into said congregation and have not signed the constitution of said church; that not one of said plaintiffs is entitled to vote for church officers of said congregation by reason of the facts aforesaid, and are by the provisions of the said constitution as it was then, and now is as amended, disqualified from holding office or voting at any election for church officers, and they and each of them have been so disqualified for more than two years from voting or holding office in said church.

"That Art. VII. of the constitution, as it was, and as it exists now, is the same. Sections 1 and 2 are as follows:

"1. All congregational elections must be published by the church council to the congregation at least two weeks before the election.

"2. At these elections only such persons shall be entitled to vote who are in full communion with the church and have signed the constitution, who submit to its government and discipline regularly administered, who have within the year previous communed—unless providentially prevented, and who have contributed according to their ability and engagements to all its necessary expenditures.'

"That said plaintiffs are all, and each is, disqualified from voting or holding office in said congregation, for the reason that none of the plaintiffs have within a year communed in said church, and they were so disqualified at the last election for officers, though they were not refused the right to

vote nor debarred from voting by any of the defendants or said congregation, but they refrained from voting or absenting themselves from such election; that on November 26th, 1882, said Rottman was a deacon in said congregation, and had been for some time such officer therein, and on that day he tendered his resignation to the congregation and withdrew from the council of said church, and his said resignation was accepted by the said congregation; that on February 6th, 1883, the said George F. Kregel asked for leave to withdraw from the membership of said congregation, and asked for a certificate of dismissal from the said church, and the same was allowed and issued to him, and he has never been reinstated to membership in said congregation since that time; that the said Henry Noelting, on October 24th, 1880, was, at an election held by said church, elected to the office of deacon in said congregation, and thereupon he was installed into said office, when it was learned that he was not a member of said congregation, nor a member of any Lutheran church, which fact he admitted, and a new election was ordered and held to fill the vacancy; that he has not been received into said church as a member by the said congregation since then; that said plaintiffs are alone in their efforts to seize the said property, and are not supported by even a respectable portion of said congregation, and are not supported by any member of said congregation in good standing in said church, so far as defendants have been able to learn; that said congregation is in charge of said church through their said trustees, the defendants, and the plaintiffs have no right therein, either as officers or members, because of the facts aforesaid; that on the said 18th of December, 1884, the following provisions were in the church constitution, to-wit:

“ART. I.—*Of the Name.*—The name of this church shall be “The First Evangelical Lutheran Church of Nebraska City.”

“ART. II.—*Doctrinal Position.*—This church, in accord-

ance with the doctrinal basis of the General Synod of the Evangelical Lutheran Church in the United States, and in the words thereof, receives the word of God as contained in the canonical scriptures of the Old and New Testaments as the only infallible rule of faith and practice, and the Augsburg Confession as a correct exhibition of the fundamental doctrines of the Divine Word and of the faith of our church, founded upon that word.'

"ART. IV.—*Of the Pastor.*—The pastor of this church shall be a member of some synod in connection with the General Synod of the Evangelical Lutheran Church in the United States.'

"That on said 18th day of December it was unanimously resolved at said meeting to change and amend said articles I., II., and IV. so that they should read as follows, and a resolution so amending them was unanimously framed by said congregation, to-wit:

"ART. I.—*Name.*—The undersigned have associated themselves together as a religious society under the name of the First German Evangelical Zion's Congregation in Nebraska City, in Otoe county, Nebraska.

"ART. II.—We profess to be a Christian society, believing with the Apostle Paul, 1st Cor. iii. 11, that no other foundation can be laid than that as laid in Jesus Christ; we profess to be an Evangelical society, considering ourselves members of the Evangelical church of Christ which takes the Holy Scriptures as the word of God, as the only true doctrine of faith, and the exposition of the Holy Scriptures as laid down in the Lutheran and Reformed church, namely: The catechism of Luther and the Heidelberg catechism, as near as they correspond. In their difference we hold to the Holy Scriptures relating thereto.'

"ART. IV.—The pastor of this congregation shall be a member of the German Evangelical Synod of North America.'

"Defendants allege that said two names designated but one and the same body of people, to-wit: The congregation worshipping in the church building described in the petition, of which body defendants are the trustees and hold and own said property to the use and benefit of said congregation to be used and disposed of as the said congregation shall direct, whether it order the same as the first named society or the second."

The plaintiffs in their reply say that they do not claim that the General Synod of the Lutheran church has authority over the property, or can dispose of the same, but allege that the property was purchased by the original organization for the purpose of worshipping in accordance with the tenets of the church of which the synod is the representative; that the Church Extension Society of said Lutheran church did aid in the erection of said building, and while the money advanced to said organization has been refunded, yet the Church Extension Society donated the use thereof without interest, and the General Synod of the Lutheran church supported the pastor of the church in question for a long time; that on the 18th of December, 1884, the defendants and those acting with them did unite with said Zion's congregation, and did ordain that said congregation "shall adhere to the faith of the Evangelical Christian church;" that plaintiffs do not desire to unite with said Evangelical Christian church, or with said Zion's congregation, and do not desire to have settled over them a pastor who is a member of the Evangelical Synod of North America, but desire still to adhere strictly and faithfully to the doctrines, discipline, and tenets of the Lutheran church.

There are a number of other allegations in the reply, in which the plaintiffs claim the right to said church property and deny the right of the defendants to the possession of the same.

On the trial of the cause the court found "that the de-

defendants, Herman H. Bartling, Frederick W. Rodenbrock, Henry Fastenau, Albert Schnitker, Adam Schafer, and William Luecke, and Louis Hobine, were at the commencement of this action, and now are, the legal trustees and council of the First Evangelical Lutheran church of Nebraska City, and as such trustees and council are entitled to the possession, care, custody, and control of the property of said church consisting of the real estate and other property described and referred to in the pleadings herein, as provided by the constitution of said church.

“And the court doth further find that the new amended constitution purporting to have been adopted on the 18th day of December, 1884, was not framed and adopted in accordance with the provisions of the constitution of said church, but in violation thereof, and is invalid and of no effect, and that the defendants should be restrained from observing or conducting the affairs of said church under said new or amended constitution, wherefore it is considered, ordered, adjudged, and decreed by the court, that the defendants Herman H. Bartling, Frederick W. Rodenbrock, Henry Fastenau, Albert Schnitker, Adam Schafer, and William Luecke and Louis Hobine are the legal trustees and council of the First Evangelical Lutheran church of Nebraska City, and as such trustees and church council are lawfully in the possession of the property belonging to said church, to-wit: Lots one (1) and two (2) in block eight (8) in South Nebraska City, a part of Nebraska City, in Otoe county, Nebraska, together with the church edifice and other buildings and improvements thereon, and all property in the said church edifice, and the church communion service, and are lawfully entitled to remain and continue in the possession thereof and to direct and manage the affairs of said church.

“And it is further ordered and decreed by the court that said defendants, as trustees and church council aforesaid, be and they hereby are restrained from observing or conduct-

ing the affairs of said church under the said new or amended constitution purporting to have been adopted December 18th, 1884. To so much of this finding and decree as finds the defendants are the legal trustees of said church, and that they are entitled to the possession of the church property, the plaintiffs except, and to the finding that the new or amended constitution purporting to have been adopted December 18th, 1884, is invalid, and that portion of the decree restraining defendants from managing the affairs of said church under said new or amended constitution defendants except.

"It is further ordered by the court that the plaintiffs and defendants each pay half the costs of this action, the whole costs being taxed at the sum of \$156.13."

The plaintiffs appeal.

On the trial the plaintiffs introduced a deed from C. F. Holly and wife to the trustees of the First Evangelical Lutheran church of Nebraska City, dated January 20th, 1867. The plaintiffs then introduced the constitution of said church, as follows:

"ARTICLE I.—*Its Name*.—This congregation shall be known by the name The First Evangelical Lutheran Church in Nebraska City, Neb.

"ART. II.—*Its Doctrinal Basis*.—This congregation, in harmony with the doctrinal standpoint of the Evangelical Lutheran General Synod of the United States, accepts the word of God as contained in the canonical books of the Old and New Testaments as the only infallible rule of faith and practice, and the Augsburg Confession as a correct exhibition of the fundamental doctrines contained in the word of God.

"ART. III.—*Membership*.—All such persons who in their infancy have been baptized, and after previous instruction in the doctrines and duties of the word of God and upon their confession of faith have been confirmed, shall be considered as regular members of this congrega-

tion. Also such persons, though not baptized in their infancy but afterwards, after previous instruction and upon their confession of faith and baptism, shall be received as members. Furthermore such persons who have been members of some other Lutheran congregation or Evangelical church may be received as members upon presentation of a certificate of honorable dismissal from the congregation to which they belonged, or upon a repeated public confession of their Christian faith. Persons, whether from this or another congregation, who have been excommunicated shall have no rights until they have repented and have again been received as regular members.

"2. The principal duties of the members are the following: They shall live a humble, holy, and useful life; attend divine services faithfully; partake of the Lord's supper regularly; hold devotional and family worship. They shall endeavor, by an exemplary life and godly conversation, to lead the unconverted to Christ; to care for the instruction of the youth; to contribute, according to their means, to the maintenance of public worship, to the support of the pastor, to help the poor, etc., etc.; and shall heartily participate in all orderly and scriptural ways which the congregation devises in order to ameliorate human suffering and extend the kingdom of Christ upon the earth. It shall be the duty of parents to bring up their children in the fear and admonition of the Lord, to instruct them in the doctrines of the church and to submit to its regular appointed means. And when young members have reached the proper age and are possessed of the natural abilities it is their duty to appear as worthy communicants at the Lord's table.

"ART. IV.—*The Pastor*.—1. The pastor of this congregation shall be a member of some synod which stands in connection with the General Synod of the Lutheran church in the United States.

"2. The principal duties of the pastor are the following: To preach the gospel; to administer the sacrament; to instruct the youth in the congregation in the doctrines and duties of the scriptures, in the catechism, and in other ways according to Lutheran usage; to visit the sick and all that are in need; to warn the sinners; in short to keep the vow of his ordination or licensure faithfully, and give himself wholly to winning and leading souls to Christ.

"3. Should the pastor at any time be accused of teaching unbiblical doctrines or leading an immoral life, then shall the church council (if there be trustworthy evidences) bring the accusation before the synod, and inform the president of synod of the facts, and at the same time give notice to the accused one.

"4. Of all the official duties, as baptisms, confirmations, weddings, funerals, receptions, and admission of new members, cases of church discipline, etc., the pastor shall keep a record in a book, which the congregation is to provide, which shall remain her property, and at all times be open for inspection. In case of a vacancy the secretary of the council shall keep the church book until the congregation is again supplied with a pastor.

"ART. V.—*Of the Church Officers.*—1. This consists at present of two elders, two deacons, and two trustees. At the first election one elder, one deacon, and one trustee shall be elected for one year, the rest for two years. But after this first election all the officers shall be chosen for two years, so that one elder, one deacon, and one trustee may step out of office yearly, whose vacancies are to be filled at the annual election, which is to be held on These newly elected officers shall, as soon as possible, be installed according to the formula of the synod to which the congregation belongs. Those who according to Art. VII., Sec. 2, are not entitled to vote, cannot be elected.

"2. The duties of the elders consist, among others, in the following: To live an exemplary life, faithfully to par-

ticipate in all the inner and outer affairs of the congregation, to visit the Sunday and week schools, to assist the pastor in visiting the sick, in holding devotional meetings, and in his endeavors to maintain peace and harmony in the congregation.

"3. The duties of the deacons consist, among others, in the following: To live an exemplary life, to participate in all the inner and outer affairs of the congregation, especially to take up the collections at public worship, to distribute gifts which the poor are to receive, to see to it that the pastor receives sufficient support, to assist at communion and baptisms in securing the necessary things, as bread, wine, and water, and in general to see to it that all the necessities belonging to the outer affairs of public worship are cared for.

"4. The duties of the trustees consist, among others, in the following: To live an exemplary life, to participate in all the affairs of the congregation faithfully; to see to it that the property of the congregation, which belongs to it now or which may belong to it in the future, be kept in good condition, in so far as their duties correspond with Art. VI., Sec. 6, and therewith be construed.

"ART. VII.—*Of the Church Council.*—1. The church council consists of the pastor, or pastors, elders, deacons, and trustees.

"2. The church council has the general oversight of all the secular and spiritual affairs of the congregation, and shall endeavor conscientiously and faithfully, according to biblical principles, to promote the interests of the same.

"3. It shall exercise church discipline over all such members who live an immoral life and foster false doctrine. To this end it is empowered to call up any member to give an account, and to cite others before it as witness, as the case may be. It shall be authorized, in case any member has given offense, first, privately to give admonition; or, if necessary, to call him to account; and, when these meas-

ures prove ineffectual, to suspend or excommunicate such member; viz., to deny him all rights of membership, according to apostolic injunctions. The council shall further be empowered to restore all church privileges to such as have been suspended or excommunicated, after they have acknowledged their sins and sincerely repented. Every act of excommunication or restoration shall publicly be made known to the congregation. Should a church member, in reference to his rights, not be satisfied with the decision of the council, he may then appeal to synod with which the congregation is in connection. But in every such case the accuser must, within two weeks from the time the decision took place, inform the church council of the fact. He must also state the cause of his dissatisfaction and the grounds for his appeal.

"4. The church council elects its own secretary and treasurer. The pastor, in virtue of his office, acts as chairman.

"5. The church council may, at any time when important questions, which the constitution states, arise, call a congregational meeting. The council shall have the right to decide as to the legality of such meeting; and when two-thirds of all voting members insist on the holding of such meeting, it shall in all cases take place.

"6. The church council shall have full possession of the church property, and shall endeavor to preserve the same for the use of the congregation, but it shall not be empowered to burden the same with mortgage or heavy debts, to sell it, or make alterations to any great extent, unless a majority of the votes of the members be cast at a regular meeting, which has been held according to previous announcement.

"7. The council shall annually elect one of its members who enjoys the confidence of the congregation to represent the same at synod, whose expenses, as also those of the pastor, shall be paid out of the treasury of the church.

"8. The council shall from time to time receive such persons as members who, after previous examination or upon the recommendation of the pastor, are found to be worthy to participate in the rights and privileges of a Christian congregation.

"9. The council shall keep a correct list of all persons who are considered regular members, which list is to be carefully examined and corrected at the annual meeting of the council, which is to take place on the first Monday in January. At this meeting the treasurer shall lay before the council a detailed report of all the receipts and expenditures, and this report is to be given into the hands of a committee for examination; of all the moneys in the hands of the treasurer the council may at any time decide as to its disposal. The pastor, together with half the number of the other members of the council, or, in the necessary or voluntary absence of the pastor, two-thirds of the members, constitute a quorum.

"10. The council shall hold regular quarterly meetings on the first Monday in January, April, July, and October; but it may also hold special meetings at any time, either by the pastor called together, or when two-thirds of the members of the council, or one-fourth of all the voting members of the congregation, demand it.

"ART. VIII.—*Of Elections and Congregational Meetings*.—1. Every congregational meeting must be made known to the congregation two weeks before. In case of vacancy in church council a meeting shall be called at once to fill the same.

"2. At these meetings only such persons shall be entitled to vote who are in full communion membership, who have signed the constitution and who submit to regular church discipline, who have partaken of the Holy Communion during the year—unless providentially prevented, and who contribute according to their means to all necessary expenditures of the congregation.

"3. All elections, whether for the pastor or members of the church council, must be held by ballot, and a majority of all votes cast shall be sufficient, except in the election of a pastor a two-thirds vote must be cast.

"4. At the election for members of the church council the council shall nominate as many persons as are to be elected, and the congregation may, if it chooses, nominate a like number.

"5. In case of resignation or death of a pastor, the secretary of the council shall inform the president of synod of the fact, and ask him for advice. The council shall then invite an Evangelical Lutheran pastor or pastors to preach for the congregation, whereupon an election shall take place, at which, for one person only, votes shall be cast. Should this person not receive two-thirds votes, then the name of another may be taken up.

"ART. VIII.—1. This constitution shall be signed by all who stand in regular communion membership according to Art. III.

"2. This constitution cannot be altered or improved unless it be at a meeting of the congregation legally called together by the council and made known three months before, at which meeting two-thirds votes of all the members present shall be sufficient for any alterations or improvements."

Frederick W. Rottman testifies, in substance, that he is one of the original trustees; that defendants have all the original papers and documents of the church; that he and the other gentlemen named as trustees contributed to the purchasing of the property; church was built in 1868. We got help from the general synod. That is the same synod a part of whose constitution has been offered. Eli Huber was the first pastor. We obtained assistance and the money was used for purchasing the property and erecting building for First Evangelical Lutheran church of Nebraska City, and that particular

church occupied the same to about Jan., 1885. The Church Extension society of this denomination loaned us in all \$600 without interest. The church had no affiliation with any other church organization up to about January, 1885. On the evening of Feb. 13th, 1885, myself and several other male and female members of the original church went into the building, using the key that for many years had been in Mr. Petring's possession, and accompanied by Rev. Mr. Kimmel, a regular Lutheran pastor, and were holding a religious and business meeting when the defendants and several others entered and ordered us out, and finally ejected us and put out the lights and stopped our meeting. Kimmel had authority from the president of synod and read it to them before they ejected him. The services were broken up by defendants. Since then the Evangelical Lutheran church of Nebraska City has had no possession or control of the property. Went to church on a Sunday afternoon after this, but defendants would not permit me to enter. There is no other church of this denomination in Nebraska City, and no other place for us to worship except private houses. The denomination known as Evangelical Lutheran church had held possession of this property from the time it was built up to the time we were ejected as aforesaid, and all the preachers settled over the congregation were connected with the general synod.

Geo. H. Meyers testified that he acted as clerk of meeting of the Evangelical Lutheran church, held at Nebraska City, Jan. 31, 1885; minutes show that Rev. J. W. Kimmel was chairman, and G. H. Meyers clerk, and that Noelting, Rottman, Teten, Petring, and Meyers were elected trustees of said congregation to fill the vacancy caused by the withdrawal of the former officers, they having united with the First German Evangelical Zion's congregation. Witness then detailed the proceedings on the night of the 13th of February, 1885, substantially as testified to by Rottman,

and that Bartling, Rodenbrock, and others have had possession ever since. Petring, son of one of the original trustees, was away at school when church was organized in 1867; was elected trustee in January, 1885. The property, both real and personal, including books, papers, church records, communion service, etc., have been in possession of Bartling and party since that night. Rev. Kimmel is attached to the Nebraska synod, that is in connection with the general synod of the Lutheran church of the United States: Noelting was a member of the church, Teten was a member. At the time of the differences in 1880, when they all united again, witness acted as clerk of the meeting, and voted. Rottman was a member, had been trustee and elder. Plaintiffs and the people in general had noticed by the records that defendants had placed themselves on record as having ceased to be Lutherans, and had become Evangelicals, and consequently that property ceased to have proper officers, therefore plaintiffs as deacons and trustees were authorized to take possession by their election at the hands of the members of the church. Defendants had been in possession as trustees of the old church, but they had withdrawn and ceased to be Lutherans, and were acting under authority of Evangelicals, and were unlawfully in possession, and plaintiffs acted by authority of the Lutheran church. The plaintiffs had put a lock on that church prior to Feb. 13, by authority of the Lutheran church. Rev. Kimmel had not been "called" by the congregation, but was sent here by the president of synod of which that church is a member. A part of the congregation withdrew in 1880, but afterwards reunited with the church, and always afterward acted with the Lutheran church. There was no objection to defendants, nor interference with them prior to the time they changed the constitution and united with the Zion's congregation, and no attempt to take possession of the property so long as they acted under the state and general synod. When a part

withdrew in 1880, there was no controversy as to the trustees or doctrines, it was only a question about preaching English or German, and they afterwards reunited and called Rosenstengel as pastor. There are perhaps Evangelicals in the original congregation, but they always acted with the Lutherans.

John Teten testified: Was chosen trustee in the Lutheran church on Jan. 21st, 1885. Rev. Kimmel is a Lutheran preacher connected with the synod of this state, and is an officer of the synod, and is settled over a Lutheran congregation at Auburn. Witness then detailed the proceedings on the night of February 13th, 1885. There was on that night no lock but the old lock, which had been there since the church was built. Witness is a member; the old church record shows when he united. Parties went there, among other things, for an election. Knew that Bartling and Rodenbrock had been trustees and had gone into another church. The new lock was put on to keep out parties who didn't belong there—such parties as went off to another church. Only one officer was elected that night of Feb. 13th, 1885. On that night some of the other party were armed with sticks, broom handles, ax handles, and clubs.

Plaintiffs then offered in evidence a duly certified copy of the proceedings of the Zion's congregation, dated Dec. 18th, 1884, and filed for record Dec. 19th, 1884, showing that at a meeting of First Evangelical Lutheran church of Nebraska City, Bartling was made chairman and Schafer secretary, and it was resolved by a unanimous vote of those present to change the name from First Evangelical Lutheran church to First German Evangelical Zion's congregation of Nebraska City, and that the by-laws, articles of association, rules and regulations of said Lutheran church as amended and revised be spread on the records of Zion's congregation and be adopted.

Rev. Kimmel testified that he is a Lutheran preacher;

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that he and the First Lutheran church of Nebraska City are attached to the state synod, and that to the general synod of the United States; was present at meeting of state synod in September, 1884. Witness stated difference between Lutheran and Reformed church or Evangelicals to be particularly on the subject of the Lord's supper. The Evangelicals believing Christ present spiritually, and the Lutherans believing in actual presence. A further difference is that the Lutherans accept the Augsburg confession as correct in itself, and the others accept it only so far as it squares with their interpretation of the Scriptures, that is, they decline to receive that confession as an absolute interpretation. None of these denominations are admitted as members of any Lutheran synod, and their pastors are in no way whatever connected with or under control of any Lutheran synod. Witness then gave in detail the proceedings of the night of Feb. 13th, 1885. None of these parties acting with Bartling at that time are members of the First Lutheran church of Nebraska City. Was authorized to act by letter from president of synod and under seal of synod dated Jan. 14th, 1885, which letter has since been mislaid and cannot be found, and showed that letter to Bartling. Bartling pushed him out after he showed him the letter. The Church Extension Society is a corporate body made up of members of the general synod to help needy churches and to build churches. It has no connection with the Evangelical church; it furnishes no help outside of the general synod of the Lutheran church, and it is so stated in all applications. At the first meeting but five trustees had been elected, and we were going to elect the sixth that night; that was what the meeting was called for. Meyers was secretary of the board of trustees. That letter was all the authority witness needed. The president of synod has authority to appoint a man to act where there is no pastor. Defendants were not asked to that meeting because they were not members of the Lutheran church.

The testimony of Rev. Eli Huber was taken by deposition, as follows: "Reside in Philadelphia, and have been a Lutheran minister connected with the general synod since 1858; pastor of First Evangelical church of Nebraska City, from 1866 to 1876; since then the pastors have been connected with the same synod. Synod adopts the Augsburg confession and Luther's catechism; do not use the Heidelberg catechism, nor do any Lutheran churches, it is the standard of the Reformed church; it differs from Luther's catechism mainly on the subject of predestination and the Lord's supper; the latter was the cause of separation of the Protestant church into Lutheran and Reformed. The general synod and the German Evangelical synod of North America are two entirely distinct bodies, having no connection with each other and no church or minister can be connected with both. No minister or church would be received into Lutheran synod without accepting the Augsburg confession in its unaltered form, that is the confession of A.D. 1530. The Evangelical synod of North America is not connected in any way with the general synod, or with any other Lutheran body. This field was, in 1866, assigned to the Alleghany synod, and I was sent as missionary to establish the First Evangelical Lutheran church of Nebraska City. During the first four years of my pastorate in Nebraska City I received from the Alleghany synod in all \$2,300. I also collected from the churches belonging to general synod \$350 for the erection of this building, and the Church Extension society of general synod loaned \$500 on three years' time without interest for the erection of this church."

Rev. Conrad Huber testified: "Reside in Saunders county, Nebraska; am president Lutheran synod of Nebraska; same is subject to general synod of the United States. The membership of the First Evangelical Lutheran church of Nebraska City as per last official report was 116. The Evangelical synod of North America is an en-

tirely different organization from general synod of Lutheran church. There is and can be no connection between these two bodies and still retain their identity. There is no such body existing as the Evangelical *Lutheran* synod of North America. There has never been any application made to me relative to the vacancy in the Nebraska City church. When I heard of the condition of affairs there, I instructed Rev. Kimmel to go to Nebraska City, and look after the interests of the church and its property. He is a regular member of our synod."

Rev. W. F. Eyster testified: "Have been a Lutheran pastor or professor in Lutheran institutions for forty-four years. Am acquainted with its doctrines, discipline, and organization. Have some acquaintance with tenets and doctrines of Zion's congregation of Nebraska City. The basis of that belief is as follows:

"We profess to be a Christian society believing with Apostle Paul, 1 Cor. iii. 11, that no other foundation can be laid than is laid on Jesus Christ. We profess to be an Evangelical society, considering ourselves members of the Evangelical Church of Christ, which takes the Holy Scripture as the word of God, as the only true doctrine of faith, and the exposition of the Holy Scriptures as laid down in the Lutheran and Reformed churches, named the catechism of Luther and the Heidelberg catechism, as near as they correspond. In their difference we hold the Holy Scripture in relation thereto.

"The doctrinal basis of the Evangelical Synod of North America as laid down in their constitution is as follows:

"The German Evangelical Synod of North America, as a part of the Evangelical church, is that community which believes that the Holy Scriptures of the Old and New Testament is the word of God and the only infallible rule of faith and life, following the interpretation of the Holy Scriptures as laid down in the symbolical books of the Lutheran and Reformed churches, which principally

are the Augsburg confession, the Lutheran catechism, and the Heidelberg catechism, as far as the symbolical books agree with another. In their variances the Evangelical Synod of North America adheres to the Holy Scriptures, and reserves for itself the freedom of conscience which prevails in the Evangelical church on these important points.'

"The Lutheran church makes subscription to the Augsburg Confession as a correct exhibition of the fundamental doctrines of the divine word, an express test of admission to her ministry and synodical conventions. The Evangelical church ignores it as such exposition. The Evangelical church further differs from the Lutheran church in that they make the catechism of Luther co-ordinate with the Heidelberg catechism as authority in matters of faith, and may accept or reject its teachings on the important points on which the two catechisms differ. It further differs in allowing her ministers or members to hold doctrinal views accordant or discordant with the Lutheran confession, according to individual judgment.

"The Heidelberg catechism was drawn up in 1562 to set forth the distinctive doctrines of Zwingli and Calvin as against the Roman Catholic church and certain points of Luther's views. The variances between the two catechisms respect mainly the presence of Christ, the nature and efficacy of the sacraments, baptism, and especially the real presence of Christ at the Lord's Supper.

"The Evangelicals believe that Christ is present on earth only with respect to his divine nature. The Lutherans believe that his human and divine nature are inseparably united in one person, with regard to the sacraments. The Heidelberg catechism teaches that there are visible signs and seals appointed by God. The Lutheran catechism teaches that there are efficacious signs and effective means of grace.

"These are the points of difference between the doctrinal teachings and symbolical books, and which originally led to the separation of the Protestant church into Lutheran and

Reformed, and has kept them in existence as separate ecclesiastical organizations.

"Am a member of Nebraska synod. That synod claims and exercises over its individual churches and congregations the authority given by the formula of government and discipline prescribed by General Synod.

"District synods combine mandatory and advisory powers. It is the duty of district synods to see that the government and discipline prescribed are observed by all the congregations and ministers within their bounds; to receive appeals from decisions of church council and affirm or reverse them; to form and change ministerial districts; to tend to any business relating to the churches which may be brought before them; and to provide supplies for vacant pulpits.

"Chapter VIII., section 6 of formula, provides that when a congregation shall refuse to observe the resolutions of synod or provisions of formula, it shall be excluded from connection, and no other synod nor Lutheran minister nor licentiate shall take charge thereof without permission of the president.

"The Zion's congregation of Nebraska City is not on the official roll of the synod, nor could it be so received under its doctrinal basis.

"The Evangelical Synod of North America has not connection with the Nebraska synod or the General Synod of Lutheran Church. That synod has its own organization, institutions, and publications distinct from all other denominations. No person can be a member of both organizations at the same time.

"No pastor who subscribes to Art. II. of constitution of Zion's congregation could belong to any Evangelical Lutheran synod.

"I understood the church at Nebraska City to have been originally organized as a constitutional part of the Evangelical Lutheran synod, and that a portion of the congre-

gation still adhere to the doctrinal basis and government of the Evangelical Lutheran church, and is now a member of the synod under which that church was originally organized."

The following are the articles of incorporation of the First German Evangelical Zion's Congregation, introduced in evidence by the plaintiffs:

"NEBRASKA CITY, NEB., Dec. 18th, 1884. Be it remembered, that in pursuance of notice given by the proper authorities for this purpose, a majority of the members of The First Evangelical Lutheran Church of Nebraska City, Neb., have this day met in convention, and transacted the following business: The house having been called to order, Mr. H. H. Bartling was chosen chairman and Mr. A. Schafer as secretary of this meeting. Thereupon it was resolved by a unanimous vote of members present to change the name of the society from First Evangelical Lutheran Church of Nebraska City, to that of *Die Erste Deutsche Evangelische Zion's Gemeinde* of Nebraska City. By which last name this society shall do all its business; and thereupon it was further resolved by a unanimous vote that the by-laws and articles of association, rules and regulations of the said First Evangelical Lutheran Church of Nebraska City as amended and revised, and as so amended are spread upon the records of this society, be adopted as the articles of association, by-laws, rules, and regulations of this *Die Erste Deutsche Evangelische Zion's Gemeinde* of Nebraska City, and the same are hereby so adopted, ratified, and confirmed. And thereupon it was further resolved that a substantial embodiment of the provisions of such articles be attached hereto, and made a part hereof.

"The provisions of said articles are in substance as follows:

"Article 1 provides, that the name of this congregation shall be *Die Erste Deutsche Evangelische Zion's Gemeinde von Nebraska City*. Art. 2 provides, that this congregation

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shall adhere to the faith of the Evangelical Christian church (that is Ev. and Lutheran, United and Reformed). Art. 3 provides, that all persons who have been baptized, confirmed, and who declare themselves adherents of the faith of said Ev. church, and otherwise lead a moral and Christian life may become members of this congregation. Art. 4 provides, that the pastor shall be a Christian, law-abiding person, and a member of the Evangelical Synod of North America. The pastor by virtue of his position shall be president of the church council. Art. 5 provides, that the directors and officers of this church shall consist of two elders, two deacons, and two trustees, all of whom shall be elected every two years by a majority vote of the members present at the election. Art. 6 provides, that the church council shall consist of the pastor, elders, deacons, and trustees. Art. 7 provides, that all notices of election shall be given two weeks prior to such election by the church council. Art. 8 provides for amending the constitution and by-laws, and for making additions thereto.

"And after having so adopted said articles as aforesaid, it was resolved that a copy of these proceedings be recorded in the recorder's office of Otoe county in the state of Nebraska, and henceforth this society shall be and is a body corporate under the laws of the state of Nebraska, and shall be known and do business, and hold property for religious purposes only, under the name and style of *Die Erste Deutsche Evangelische Zion's Gemeinde* of Nebraska City, all in the county of Otoe and state of Nebraska; and thereupon the meeting adjourned.

"ALBERT SCHNITKER, } Trustees.
 "H. FASTENAU, }

"H. H. BARTLING,
 "Chairman.

"A. S. SCHAFER,
 "Secretary of Meeting."

The plaintiff also introduced the following in evidence:

" At a meeting of the First Evangelical Lutheran Church held at Nebraska City, January 21st, 1885, the following business was transacted : Presiding officers of this meeting were, Rev. J. W. Kimmel, chairman, G. H. Meyer, clerk.

" The following officers were then duly elected as a ' Board of Trustees ' of the above named congregation to fill vacancy caused by the withdrawal of the former officers, they having united with *Die Erste Deutsche Evangelische Zion's Gemeinde*, as recorded in the county clerk's office of Otoe county, Nebraska, Dec. 20th, 1884, for the unexpired term of office.

" Trustees, { B. H. NOELTING,
F. W. ROTTMANN,
JOHN TETEN,
F. W. PETRING,
G. H. MEYER.

" REV. J. W. KIMMEL,
" *Chairman.*

" G. H. MEYER,
" *Clerk.*"

The testimony on behalf of the defendants fails to deny that on behalf of the plaintiffs, except upon two material points : First, that there is any material change in the doctrines or government of the church. Second, that Rev. Kimmel and the plaintiffs were ejected by force from the church on the night of February 13th, 1885. It will be observed that Sec. 2, Art. VIII. of the constitution of the Evangelical Lutheran church provides that : " This constitution cannot be altered or improved unless it be at a meeting of the congregation legally called together by the council and made known three months before, at which meeting two-thirds votes of all the members present shall be sufficient for any alterations or improvements." Yet in open defiance of this provision a meeting was called without such notice having been given and an attempt made to change the constitution

of the church, and transfer the church to another denomination. The points of differences in the two churches are sufficiently set out in the testimony and need not be further referred to, except to say that it is apparent that material differences do exist both in matters of belief and in the form of government.

The controlling question in the case is, whether the plaintiffs and their associates or the defendants and their associates constitute the true and legitimate First Evangelical Lutheran Church of Nebraska City. In our view the testimony clearly shows that the plaintiffs and their associates constitute the First Evangelical Lutheran Church at Nebraska City. In determining the question of legitimate succession of a religious society, where a separation has taken place, a court will adopt the rules of such society and enforce its polity in the spirit and to the effect for which it was designed. *Harrison v. Hoyle*, 24 O. S., 254. If this were not so it would be possible for a faction in any church by concerted effort to change its doctrines and form of government.

The leading case upon this subject is the *Attorney General v. Pearson*, 3 Meriv., 409, where it was held that if a fund, real or personal, be given in such a way that the purpose be clearly expressed to be that of maintaining a society of Protestant dissenters, promoting no doctrines contrary to law, it is then the duty of the court to carry such trust into execution and to administer it according to the intent of the founders. In the same case, p. 400, the chancellor says: "Where a congregation becomes dissentient among themselves, the nature of the original institution must alone be looked to as the guide for the decision of the court, and to refer to any other criterion (as to the sense of the existing majority) would be to make a new institution, which is altogether beyond the reach and inconsistent with the duties of the court. The cases of *Oragdallie v. Aikman*, (1 Davis P. C., 1); *Foley v. Wont-*

ner, (2 Jacob & Walk., 245); *Leslie v. Birnie*, (2 Russell, 114); *Davis v. Jenkins*, (3 Ves. & Bea., 156), and *Milligan v. Mitchell* (3 Mylne & Craig, 72, and 1 Mylne & Keen, 446), recognize the same principles."

In *M. E. Church v. Wood*, 5 O., 283, where certain members of the Methodist church seceded therefrom, and brought an action to compel a division of the corporate property, their right to recover was denied. The court say, p. 288: "The efforts of the dissatisfied members are not directed within the church, to effect a reformation in its government and discipline, according to the usage of the society, to conform it to their wishes. They moved off in a body of several hundred and associated themselves not as *the* Methodist Episcopal church, but, as is now claimed for them in argument, a persecuted body, forced from the church by the intolerable tyranny of its government. The body of persons thus separated agreed upon articles of association, differing essentially from the rules governing the Methodist Episcopal church. By these articles of association they have since conducted their affairs, and conducted worship as a distinct church, denying all accountability, alike in the spiritual and corporate power, of the Methodist Episcopal church.

"In this state of facts it is difficult to perceive the ground on which the claim is now advanced, that they remain the Methodist Episcopal church. Those remaining in that church have continued to exercise the corporate functions in conformity with the provisions of the act of incorporation; and against a body who have acted openly upon other principles, and continued so to do until this time, they must be held in this action, the corporation."

The same principle applies in this case. The fact that these defendants did not move off in a body, but sought to retain possession of the church building does not change the rule. All the testimony tends to show that they have seceded from the Lutheran church, and as such seceders

have no right to the property of the church. *Kinskern v. Lutheran Churches*, 1 Sandf. Ch., 439. *Harrison v. Hoyle*, 24 O. S., 254. *Field v. Field*, 9 Wend., 401. *Gable v. Miller*, 10 Paige, 627. *S. C.*, 2 Denio, 492. *M. E. Church v. Wood*, 5 Ohio, 283.

The judgment of the district court is reversed, and judgment will be entered in this court ousting the defendants from the possession of such church property and investing the plaintiffs and their associates in the Lutheran church with the possession thereof, and enjoining the defendants or any of them from interrupting or interfering with such possession.

JUDGMENT ACCORDINGLY.

THE other judges concur.

THE STATE OF NEBRASKA, EX REL. W. E. PEEPLES,
v. JOHN M. THAYER.

Constitutional Law: BOUNDARIES OF COUNTY. The act of the territorial legislature of March 7th, 1855, entitled "An act defining the boundaries of counties therein named, and for other purposes," in so far as it defines the boundaries of Blackbird county, is inoperative and void, as being in violation of the act of Congress approved May 30, 1854, entitled "An act to organize the territory of Nebraska," and which reserved from within the boundaries of the territory the Indian reservation of which said Blackbird county was a part.

ORIGINAL application for mandamus.

Barnes Brothers, for relator.

William Leese, Attorney General, for respondent.

REESE, J.

This is an application to this court, in the exercise of its original jurisdiction, for a writ of mandamus to the governor of the state for the purpose of requiring him to designate the temporary county officers and county seat of the county of Blackbird, in order that said county may become organized as one of the counties of the state. The attorney general, representing respondent, appeared and demurred to the petition and alternative writ, upon the ground that they do not state facts sufficient to constitute a cause of action, or entitle relator to the relief prayed.

From the petition and record before us it appears that prior to the commencement of this action the citizens of the territory which it is alleged constitutes the county of Blackbird presented to respondent their petition for the organization of said county, the appointment of special county commissioners, and the designation of a temporary county seat, under the provisions of article II. of chapter 17, Compiled Statutes, entitled "Organization of new counties." The prayer of this petition was refused by respondent on the 28th day of June, 1887, for the reason that he, respondent, did not believe he had authority so to do under the provisions of the act of the territorial legislature, by which the boundaries of Blackbird county were alleged to have been established.

Two questions are presented by the demurrer for decision, which are: *First*, As to the authority of the judicial department of the state to coerce the chief executive officer to perform a ministerial act; and *Second*, Should this power exist, whether it is the duty of respondent to perform the acts prayed for in the petition of relator.

As we view the case, the decision of the second or last question must be decisive of the whole case, and therefore it becomes unnecessary to inquire as to the first.

Considerable has been said by counsel in the argument as

to the great inconvenience and annoyance to the settlers upon the territory in question, resulting from a want of proper county organization, the establishment of county government, of public schools, and many other conveniences and necessities of which they are deprived. The condition of those people is, no doubt, to be deplored, and some action should be taken by the proper authorities at an early day for their relief and for the establishment of proper government; but this action cannot, perhaps, be taken by the executive alone. The case at bar involves simply the question of the duty of respondent under the law, and no consideration can properly enter the case to aid in its solution excepting this one.

The act of the territorial legislature by which it is claimed the boundaries of Blackbird county were established, was approved March 7th, 1855, more than thirty years ago. The boundaries of the county are defined in the third section of the act, which is as follows: "That the boundaries of Blackbird county are as follows: Beginning at the north-east corner of Burt county, thence up the middle of the main channel of the Missouri river to a point two miles north of where Omaha creek enters into the Missouri river bottom, thence west 30 miles, thence south to a point due west of the beginning. That the seat of justice of said county be and the same is hereby located at Blackbird City." Laws of 1855, 342.

It may well be doubted whether the partial boundary thus established would be sufficient to require the executive to organize the territory thus sought to be enclosed. Yet this question need not be decided, and will not be discussed. At the time of the passage of the act above referred to, the territory in question constituted a part of an Indian reservation, and it becomes important to inquire whether or not at that time it was competent for the territorial legislature to assert its authority over it to the extent of the establishment of county boundaries.

Among other provisions of section 1 of the act of congress approved May 30, 1854, entitled "An act to organize the territory of Nebraska"—General Statutes of Neb., 37—is the following proviso: "*Provided further*, That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory, which, by treaty with any Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the territory of Nebraska until said tribe shall signify their assent to the president of the United States to be included within said territory of Nebraska, or to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never passed."

It will be seen by the foregoing that all "*such territory shall be excepted* out of the boundaries, and constitute *no part of the territory* until the assent of the tribe occupying the territory reserved should be obtained."

It is not claimed that this assent had been obtained at the time of the passage of the act.

By the several treaties between the United States and the Omaha Indians—Revision of Indian Treaties, pp. 564, 539—and the Winnebago Indians—Id., 1014—and the memorial and joint resolution adopted by the territorial legislature of Nebraska of January 23, 1856—Laws 1856, 236—as well as by the public history of the territory and state, it appears that the rights of the Indians to the reservation remained unextinguished up to the time of the admission of the territory as a state in 1867. This being

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true, it is apparent that at the time of the passage of the act of the territorial legislature in 1855, establishing the boundaries of Blackbird county, neither the legislature nor any other department of the territorial government had any jurisdiction or authority to establish county boundaries within the reservation, and that the act in that behalf was void.

This also has been the evident opinion of the territorial and state officers and legislatures ever since the passage of the act of 1855. No steps have been taken and no effort has been made to organize the county nor to make it a part of the settled portion of the state. There has been no recognition whatever of the existence of such a county for thirty years, and when the state legislature in 1873, by its act of March 3d of that year, defined the boundaries of all the, then, counties of the state, no reference was made to Blackbird county, and the territory which it is now claimed constitutes that county was not included as a county, save that part which was included within the county of Cuming. Subsequent to that time—in 1879—another portion of the reservation was placed within the boundaries of Burt county, and in 1881 another portion was added to Wayne county. The act of 1879, defining the boundaries of Burt county—Laws 1879, 77—not only separates a part of this territory from the alleged county of Blackbird, but recognizes the existence of the Omaha reservation, by commencing at the south-east corner thereof as the initial or beginning point of the boundary line of Burt county. These facts present another suggestion, which is, that if respondent has authority to cause the organization of the county of Blackbird under the provisions of the act of 1855, he must do so with direct reference to the boundaries established by that act. He has no authority to depart therefrom. The exercise of that authority would be to ignore the acts of the legislatures of 1873, 1879, and 1881, by which great con-

fusion would ensue in the collection of state and county revenues, and in the enforcement of the laws—a step which any executive might well hesitate to take until directed by legislative enactments which would remove the difficulty.

We therefore hold that the act of 1855, in so far as it assumed to establish the boundaries of Blackbird county, was void, and that it is not the duty of respondent to comply with the petition asking the organization of that county.

The writ is therefore denied.

WRIT DENIED.

THE other judges concur.

JAMES F. MCCOY, PLAINTIFF IN ERROR, v. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Larceny: INFORMATION:** An information charging a defendant with the crime of larceny in the following form: "That on or about the 22d day of May, in the year of our Lord one thousand eight hundred and eighty-five, one James F. McCoy, late of said county of Madison, and state aforesaid, unlawfully, willfully, and feloniously, one brown gelding of the value of \$150, of the personal property of one Victor Cavalin, did convert to his own use, with the intent to steal the same, the said James F. McCoy, then and there being the bailee of said property," *Held*, To be insufficient to support a verdict of guilty and judgment thereon as not alleging that the crime was committed within the jurisdiction of the court in which the information was filed.
2. —: **VERDICT.** The verdict by which the defendant was found guilty of larceny "in manner and form as charged in the first count or paragraph of the information," without ascertaining the value of the property alleged to have been stolen, is insufficient, under the provisions of section 488 of the criminal code, to sustain a sentence of imprisonment in the penitentiary.

ERROR to the district court for Madison county
Tried below before CRAWFORD, J.

22	418
152	532
53	302
23	418
152	301

William V. Allen, for plaintiff in error, cited Maxwell's Crim. Proc., 639, *et seq.*

William Leese, Attorney General, for the state.

REESE J.

Plaintiff in error was convicted of the crime of larceny as bailee of personal property, under the provisions of section 121b of the criminal code. He was sentenced to two years imprisonment in the penitentiary, and brings the cause to this court by petition in error. Pending the proceedings in this court he made application for a writ of *habeas corpus*, by which he seeks to be admitted to bail. His petition for the writ being submitted, was taken under advisement, and pending decision thereon the proceedings in error were submitted upon the merits by the counsel for plaintiff in error and the attorney general.

The information consists of two counts, one for the larceny of the property described, the other for embezzlement. Upon the trial the court gave to the jury instruction number nine, which is as follows: "You are instructed to find defendant not guilty as to the second count in the information." By this the cause was retained for trial only upon the first count.

The charging part of this count is as follows: "That on or about the 22d day of May in the year of our Lord one thousand eight hundred and eighty-five, one James F. McCoy, late of the said county of Madison, and state aforesaid, unlawfully, willfully, and feloniously, one brown gelding of the value of \$150, of the personal property of one Victor Cavalin, did convert to his own use with intent to steal the same, and he, the said James F. McCoy, then and there being bailee of said property aforesaid," etc.

It will be observed that this count of the information

contained no allegation as to the county or state in which the alleged crime was committed. This was evidently an oversight on the part of the pleader, as it is elementary that to confer jurisdiction upon the court for the trial of an offender the information or indictment must allege specifically that the crime was committed within the jurisdiction of the court. No argument upon this proposition is deemed necessary, and its consideration may be dismissed with the remark that the information is clearly insufficient to sustain the judgment.

The verdict of the jury upon which the judgment is based, is as follows :

"We, the jury duly impaneled and sworn in the above entitled cause, do find the defendant, James F. McCoy, guilty in the manner and form as charged in the first count or paragraph of the information, and not guilty as to the second count or paragraph of the information."

The section under which the plaintiff in error was convicted, is as follows : "That if any bailee of any money, bank bill, or note, goods, or chattels, shall convert the same to his or her own use, with the intent to steal the same, he shall be deemed guilty of larceny in the same manner as if the original taking had been felonious, and on conviction thereof, shall be punished accordingly." Sec. 121*b*, Crim. Code.

It will be seen that the well established rule applicable to prosecutions for larceny, established by the criminal code of this state, with reference to the value of the stolen property, is made applicable to offenses defined by this section. "He shall be deemed guilty of larceny in the same manner as if the original taking had been felonious," etc.

By reference to section 114 and 119 of the criminal code, it will be seen that stealing of property of the value over \$35 is made a felony. Under \$35 a misdemeanor.

Section 488 of the criminal code is as follows : "When the indictment charging an offense against the property of

another by larceny, embezzlement, or obtaining under false pretenses, the jury, on conviction, shall ascertain and declare in their verdict the value of the property stolen, embezzled, or feloniously obtained."

This provision of the code, although clearly applicable to the case at bar, was wholly ignored. Its provisions are mandatory, and cannot be evaded.

The verdict, therefore, conferred no authority upon the trial court to enter a judgment or sentence by which plaintiff in error was convicted of felony. This question was presented to the trial court by the plaintiff in error in his motion in arrest of judgment, but the motion was overruled and judgment entered upon the verdict, to which the plaintiff in error excepted, and which is now assigned as error by the petition in error. The judgment, therefore, cannot stand.

The judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

THE other judges concur.

22	421
53	481

WILLIAM H. HOKE, E. GRIFFIN, A. M. COFFEE, AND
GEORGE W. AKERMAN, PLAINTIFFS IN ERROR, V.
D. S. HALVERSTADT, DEFENDANT IN ERROR.

1. **Action against two defendants: VERDICT: NEW TRIAL.**
Under the provisions of section 429 of the civil code, in an action against two or more defendants, upon a joint obligation, the evidence being ample as to one, but insufficient as to the other defendants, the verdict and judgment should be against one and in favor of the other. In such case, where the verdict was against all the defendants, and those against whom there was but insufficient evidence, made no motion for a new trial

as to themselves alone, and judgment was rendered against all, it will not be disturbed.

2. Petition, examined, and *Held*, Sufficient when assailed after verdict.

ERROR to the district court for Johnson county. Tried below before BROADY, J.

Cornish & Tibbets, for plaintiff in error, cited: *Clarke v. O. & S. W. R. R.*, 5 Neb., 331. Civil code, Sec. 92.

L. C. Chapman and *E. W. Metcalfe*, for defendant in error, cited: 1 Nash. Pl. and Pr., 142. *Turner v. Kilian*, 12 Neb., 580. *Burgess v. Everett*, 9 Ohio State, 429. *Tessier v. Reed, Jones & Co.*, 17 Neb., 105.

REESE, J.

This is a proceeding in error to the district court of Johnson county. The action was against plaintiff in error Hoke, who was a constable, together with the other plaintiffs in error, as sureties upon his official bond.

The allegations of the petition may be briefly stated to be: That on the 23d day of January, in the year 1885, the plaintiff in error, as such constable, under and by virtue of an order of attachment placed in his hands for execution, levied upon certain personal property as the property of one E. A. Halverstadt; that at the time of the levy, defendant in error held a chattel mortgage on the property to secure a debt of \$300, of which plaintiff in error had due notice, when the levy was made. Plaintiff in error sold the property, in pursuance of his levy, and this action is for the damages caused thereby to the holder of the mortgage by being deprived of the security for his debt. The answer of plaintiff in error admitted the execution of the mortgage and alleged that it was fraudulent and void as against creditors, and especially as against

the plaintiffs in the attachment proceedings. It is further alleged that the mortgaged property consisted of a stock of goods in a grocery, confectionery, and restaurant, and that after the execution of the mortgage, the mortgagor, with the consent of the defendant in error, who was the mortgagee, sold the goods in the usual course of trade with the consent and knowledge of defendant in error. The attachment proceedings are set out in full, but as there is no point made as to their legality, they need not be further noticed.

We may further remark that there is no proof in the record that defendant in error had any knowledge of the sale of the goods, nor that he had given his consent thereto. These facts are also denied by him in his testimony. There is nothing in the mortgage conferring this right, and the contention that the mortgage was void by reason of such sales, may be disposed of with the remark that the verdict of the jury upon this question must be final, it being supported by sufficient evidence.

In addition to the averments contained in the answer to which we have referred, there is a general denial of each and every of the allegations in the petition, except such as are expressly admitted. It is admitted that plaintiff in error, at the time of the seizure and sale, was constable of Todd Creek precinct, in Johnson county, as alleged in the petition, but there is no admission that the other plaintiffs in error were sureties upon his official bond nor that any bond had ever been executed. There was no testimony introduced tending in any way to prove the execution of such bond, or that the other plaintiffs in error, aside from Hoke, were bound to respond for the damages. The verdict of the jury by which the case was tried was in favor of defendant in error and against all of the plaintiffs in error, for the sum of \$130, upon which judgment was rendered against all. This was clearly erroneous, and would call for a reversal of the judgment were it

not for the fact that no separate defense or issue was presented by the sureties separate from the general answer of Hoke, and no separate motion for a new trial was made by them, they preferring to rest their defense and motion for a new trial upon the general issues involved in the case and the allegations of error presented by the principal defendant, Hoke.

In *Long and Smith v. Clapp*, 15 Neb., 417, which was an action for a breach of a joint warranty in a sale of chattels, it was decided that where the evidence was ample as to one, but insufficient as to another defendant, the verdict and judgment should be against the one only and not the other, but where the verdict was against both, and the one against whom there was but insufficient evidence made no motion for a new trial, as to himself alone, and judgment was rendered against both, the judgment would not be disturbed.

The then chief justice, COBB, in writing the opinion, says: "There was a motion for a new trial of this case, and one of the grounds therein stated is, that the verdict is not sustained by sufficient evidence; also that the verdict is contrary to law; but this point is not made, that the evidence fails especially in its application to defendant Smith. Under the common law practice, where the declaration counted upon a joint liability on the part of several defendants, and the evidence only proved a several liability as to one of them, the plaintiff was nonsuited. But not so under the code." He then quotes section 429 of the civil code, which need not be here re-copied, but which is to the effect that judgment may be rendered for or against one or more of several plaintiffs, and for or against one or more of several defendants; that it may determine the rights of the parties on either side as between themselves, and it may grant a defendant any affirmative relief to which he may be entitled.

Plaintiff in error, by his motion for a new trial, failed

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to present to the trial court the question of the want of evidence as against the sureties; no objection being made by them upon that ground, they must be deemed to have waived their right now to object.

It is now insisted that the petition of defendant in error was not sufficient to entitle him to any affirmative relief. It is true that it is not skillfully drawn, and, upon motion for a more specific statement, it might have been required to be made more definite and certain; but sufficient appears, when assailed after verdict, to show a cause of action, and the judgment will not for that reason be set aside. There was sufficient to apprise plaintiffs in error of the nature of the claim against them, and of the relief sought. This, under the liberal provisions of the code, will be held sufficient when assailed after verdict.

No prejudicial error appearing of record, the judgment cannot be molested. It is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

REGINALD P. D. HOLMES AND LEONARD W. COLBY,
PLAINTIFFS AND APPELLANTS, V. EDWARD M.
HILL, DEFENDANT AND APPELLEE.

Fraud: EVIDENCE. The evidence examined, and *Held*, To sustain the finding and decree of the district court, and not to present a case of fraud or undue influence.

APPEAL from the district court of Gage county. Tried below before BROADY, J.

Lamb, Ricketts & Wilson, for appellants, cited: 1 Story Jur., Sec. 238. 1 Perry on Trusts, Sec. 189. *Tracey v.*

Sacket, 1 Ohio State, 54. *Griffith v. Godey*, 113 U. S., 89. *Moore v. Moore*, 56 Cal., 89. *Dunn v. Chambers*, 4 Barb., 376. *Todd v. Grove*, 33 Md., 188.

Pemberton & Bush, for appellee, cited: *Eyre v. Potter*, 15 How., 42. *Korne v. Korne*, 3 S. E. Rep., 17. *Uhlich v. Mulke*, 61 Ill., 499. *Rochester v. Levering*, 104 Ind., 562. *Collar v. Ford*, 45 Iowa, 331. 1 Parsons on Contracts, *388. *Wright v. Fisher*, 32 N. W. R., 605.

COBB, J.

This is an action by Reginald P. D. Holmes and Leonard W. Colby, his guardian, plaintiffs, v. Edward M. Hill, defendant. The principal object and purpose of the action was to annul, set aside, and avoid a certain contract entered into between Holmes and Hill on the 15th day of February, 1884, at Beatrice, in this state, which contract I copy from the brief of plaintiffs :

"This agreement made and entered into this 15th day of February, A.D. 1884, by and between Reginald P. D. Holmes, of Gage county, Nebraska, party of the first part, and E. M. Hill, of the same county, party of the second part, *witnesseth*; That the said party of the first part, in consideration of the covenants and agreements of the said party of the second part hereinafter contained, covenants and agrees to provide, furnish, and supply said party of the second part a sum of money, not less in amount than twenty-five thousand (\$25,000) dollars, for the purpose of being handled, employed, invested, collected, reinvested, and used by said party of the second part in such manner and for such purposes as he may deem for the best interests of the parties hereto in accordance with this agreement, said money to be furnished to said second party by said first party for a term of seven (7) years from and after the first day of April, A.D. 1884; said party of the first part hereby agrees that said party of the second part shall have

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the sole use, management, and control of said money and the property in which it may be invested for said period of seven years, to handle, use, invest, reinvest, collect, loan, buy lands or personal property, or otherwise use, employ, and dispose of it in such manner and for such purposes as said party of the second part may deem, judge, and consider to be for the best interests of the parties hereto; the intention of the party of the first part being to furnish and supply said money to said party of the second part to be handled, used, managed, controlled, and employed the same as if said money absolutely belonged to said party of the second part, except that it is to be used and employed for the benefit of both parties hereto, as herein set forth. Said party of the second part, in consideration of the foregoing agreement on the part of said party of the first part hereby agrees to take, receive, and accept the said sum of money, not less than twenty-five thousand dollars, from said party of the first part, and to use, manage, and employ it in such manner as shall, in his best judgment, produce the best income and largest profits obtainable from it; and to that end the said party of the second part agrees that he will use and employ said money only for such purposes as will, in his best judgment, produce a profit, and will only use and employ it in making such purchases, loans, and investments, and for such purposes as will, in his judgment, produce a profit on the money invested; and said party of the second part agrees that he will diligently and to the best of his knowledge, skill, and ability, use and employ said money and its proceeds in such manner and for such purposes only as he shall deem to be of benefit to both parties hereto; and that he will faithfully and correctly account to said party of the first part for the one-half of the profits arising from the use and employment of said money, and will pay the one-half of said profits to said party of the first part, at the times and in the manner herein set forth. The full amount of said sum of twenty-five

thousand dollars (\$25,000) principal, and all the profits thereon, except such part of said profits as may be from time to time withdrawn by the parties hereto under this agreement, shall remain and be left in the hands of said party of the second part to be by him used and employed as herein stated, until the expiration of this agreement, at which time all the profits arising from the use and employment of said moneys, and not before that time divided, shall be equally divided between the parties hereto, share and share alike, and said party of the first part shall receive his said principal sum of twenty-five thousand dollars in full from said party of the second part, except such part of it, if any, as shall have been lost in the course of its use and employments by said party of the second part without any willful fault on his part—all said party of the second part agrees to do is to use his best judgment in the use and employment of said moneys, and it is agreed that he shall not be liable for any diminution of said principal sum arising from the errors of judgment in the use and employment of it. And it is agreed that neither party shall at any time withdraw from said business a sum of money exceeding the profits of said business for the preceding month, and that either party may, at the first of each month, withdraw from said business for his own use his share of the profits of said business during the preceding month, and no more. But neither party is at any time during the continuance of this agreement to withdraw any part whatever of said principal sum from its employment by said second party for the benefit of both parties in accordance with this agreement. In oruer that said party of the second part may use and employ said money for what is, in his judgment, for the best interest of both parties hereto, it is agreed that said party of the second part may purchase any kind of property he may see fit, either real or personal, or both, whenever in his judgment it will prove profitable to do so, and may sell,

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exchange, or otherwise dispose of the same whenever he may deem it proper to do so, and may execute deeds, mortgages, or bills of sale of the same, whenever necessary, in the name of said party of the first part as his attorney in fact. And said party of the first part agrees to execute a power of attorney to said party of the second part for that purpose and for the purpose of carrying into effect this agreement, which shall be irrevocable during the existence of this agreement; and said party of the second part shall have the right to loan said money or any part of it to such persons, for such time and upon such security as he may deem best, and shall have power to collect and receipt for the same, and may use said money or any part of it for any other purpose or purposes, or in any other manner that he may deem proper for the purpose of producing a profit to the parties hereto; and said first party agrees that he will not in any manner interfere with the use and employment of said money or the property purchased with it, or any part of it, by second party, and will not make, or attempt to make, deeds, mortgages, or bills of sale to or upon said property, or on any part of it, during this contract, but will leave the use and employment, management, control, and disposition of it wholly and solely to said second party for the uses and purposes herein expressed.

"And for the true and faithful performance of all and every of the covenants and agreements above mentioned the parties hereto bind themselves, their heirs, executors, administrators, each unto the other, in the sum of one thousand dollars, to be paid by the failing party unto the other as liquidated damages.

"In witness whereof the parties hereto have hereunto set their hands the day and year first above written.

"REGINALD PLUMER D. HOLMES,

"E. M. HILL.

"In presence of

"L. M. PEMBERTON."

Also to vacate, annul, and set aside a certain deed of trust executed by the said Holmes and Nettie, his wife, to the said E. M. Hill, which I also here copy :

"Know all men by these presents, that I, Reginald P. D. Holmes, of Gage county, Nebraska, in consideration of the covenants and agreements hereinafter made, and one dollar to me in hand paid by E. M. Hill, of said county, do hereby bargain, sell, convey, and confirm unto the said E. M. Hill, all my property, both real and personal, situated and being in the state of Nebraska, in trust to and for the several uses, intents, and purposes hereinafter mentioned, to-wit: In trust to sell and convey, mortgage and release, incumber or otherwise dispose of said property, or any part thereof, to such person or persons, and in such manner and upon such terms as to him may seem best, and to secure and to receipt for, handle, use and employ, loan, invest, collect, reinvest, or otherwise use or dispose of said property, or any part thereof, in such way or manner and to such persons and upon such terms as he may deem best, and at the end of seven years from date hereof account, pay over to said Reginald P. D. Holmes, his executors, administrators, the principal amounts received by him from the property hereby conveyed, less any losses that may occur without the fault or negligence of said E. M. Hill, or his successors in trust, together with all the moneys and property that may be due to said Reginald P. D. Holmes by virtue of any agreement or contract that may then be existing by and between the said Reginald P. D. Holmes and E. M. Hill, or his successors in trust. In case of the death or disability of the said E. M. Hill to act as trustee, the said Reginald P. D. Holmes hereby covenants and agrees that George G. Hill and Henry M. Hill shall succeed E. M. Hill as trustee, with the same powers hereby conferred upon E. M. Hill, and in case of death or disability of either of the last named parties the other shall have full power and authority to execute the trust.

Holmes v. Hill.

"And Nettie Holmes, wife of the said Reginald P. D. Holmes, hereby releases all her right, including her right of dower and homestead right in and to all the above described real estate.

"And the said E. M. Hill doth hereby signify his acceptance of this trust, and doth hereby covenant and agree to and with the said Reginald P. D. Holmes to discharge and execute the same according to the true intent and meaning of these presents.

"In witness whereof the parties hereunto set their hands this 23d day of February, A.D. 1885.

"REGINALD P. D. HOLMES,

"NETTIE HOLMES.

"W. D. HILL, witness."

And also to vacate, annul, and avoid a certain deed of conveyance, whereby the said Holmes conveyed to the said Hill, as trustee, certain real estate, in which the funds of Holmes had been invested, as follows, to-wit: W. $\frac{1}{4}$ N. E. $\frac{1}{4}$ and E. $\frac{1}{4}$ N. W. $\frac{1}{4}$ 10, 3, 4, Jefferson county, Neb., funds invested \$2,582.18; also, N. E. $\frac{1}{4}$ 12, 1, 4, Jefferson county, funds invested \$1,990.34; also, lots 5 and 6, block 78, Beatrice, funds invested \$2,143.81; also, lots 11 and 12, block 9, Cortland, Gage county, funds invested \$2,822.69.

There was an answer and a trial to the court, with findings and decree partly for the plaintiffs, and partly for the defendant. Both findings and decree are too lengthy to admit of their being set out here, but I will refer to their several parts as I proceed. Both parties excepted to such parts of the findings and decree as were unfavorable to their several and respective sides, and the plaintiffs bring the cause to this court by appeal.

The plaintiffs' ground and cause of action, as set out in their petition, consist mainly of the following propositions:

1. That the contracts are unfair as against Holmes, the considerations are inadequate on the part of Hill, so that

it would be inequitable, and against good conscience to allow him to retain their advantages as appear upon the face of the contracts.

2. That Holmes was induced to enter into the said contracts by means of undue influence and the abuse of fiduciary relations, which existed between the parties.

As a third proposition, subsidiary to the second; that Holmes is a person of weak, vacillating, and infirm mind and will.

Upon the first proposition the trial court did not directly find. Its first finding, and which was doubtless intended to cover this point, is, "that plaintiff Holmes is and has been of sound mind and memory, but a rank spendthrift, of much experience and travel on both sides of the Atlantic."

It may be stated as a proposition of general, if not of universal acceptance, that a person of full age, and "sound mind and memory," will be bound by his contract deliberately entered into upon a lawful consideration. And as there can be no doubt that the stipulations of the contract on the part of Hill furnished at least a lawful consideration for the contract on the part of Holmes, it was probably sufficient for the trial court to find that Holmes was possessed of a sound and unimpaired mind. The evidence upon which this finding is based is too voluminous to admit of even a resume of it here. It is a somewhat significant fact that while Holmes is represented in this litigation by a guardian, such guardian was not appointed for the reason of the mental decadence or imbecility of the ward, but that of his spendthrift habits and dissipation—habits which he acquired subsequent to the date of the first or principal contract.

If we look into the contract itself, we fail to find great evidence of either imbecility or incapacity on the one part, or of unusual craft and over-reaching on the other, but it is such a contract as a young man suddenly coming into the possession of a large sum of money, and fully aware of

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his own financial incapacity and inexperience and proneness to yield to temptation, might be likely to make while under the best of influences for the protection and conservation of his fortune. While it is not necessary, in order to uphold the contract, that its terms should be found to be absolutely fair and equal, to each of the contracting parties, yet I think that, fairly interpreted and honestly and in good faith executed and carried out by both of the contracting parties, it afforded a safe and profitable investment for the funds of the plaintiff.

On the second proposition the trial court found, "that there was no undue influence to vitiate the papers made between the parties, Holmes, plaintiff, and Hill, defendant, in February, 1884. That the fiduciary relations between the said parties commenced on the receipt of the money by defendant in London, England, in April or May, 1884."

The evidence introduced on the part of the plaintiffs to sustain the charge of undue influence may be summarized as follows: Holmes was a young man, a native of England, but had resided in Germany with his mother for four or five years. He was about nineteen or twenty years of age, of good, fair education, but without a profession, and upon his first appearance at Beatrice was without means. He worked for different people at Beatrice, De Witt, and the country thereabouts, at driving stage, as a section hand on the railroad, and similar employment. While engaged in this employment, and after he had been in that neighborhood a year or more, he casually met and had an opportunity to show some trifling service to Mr. Hill, the defendant, who chanced to be at the place where he was working. Some time afterward, Holmes thinks in the latter part of the year 1881 or the forepart of 1882, Hill was again at the house where Holmes was employed, during his absence, and left word that he would like to have him come and work for him. The next day Holmes saw Hill. They had conversation, and Hill asked Holmes if

he would not like to work for him. He replied that he would, as he had nothing to do then, and he finally went to work for him writing in his books. He remained there three or four weeks at that time. During said time Holmes took his meals at Hill's house and "slept down at the office on the table." No rate of wages was agreed upon between them. Holmes states that he told Hill, "I thought I would do it for a mere nothing, just what he felt like paying me. He let me have a little money along. Sometimes he gave me a half a dollar if I asked him for it; some times a dollar, such amounts as that."

Holmes left Hill and went to peddling fruit trees; went to Hastings, to Grand Island, returned to Hastings, worked for a man there awhile; quit and returned to Grand Island. There joined a circus, and "went all over the country." That fall he left the circus at Birmingham, Alabama, and there engaged as a street car driver. He there received a letter from home informing him of the death of his mother. At the same time he received a postal card from Hill, to come to Beatrice immediately on important business. He immediately wrote to Hill saying that he "did not have any money, and for him to send me money, as I wished to see him any way." Hill sent a railroad ticket and money to Holmes, by means of which he finally returned to Beatrice, arriving there in November, 1884. Upon his arrival at Beatrice Holmes received from the hands of Hill a letter from London, reiterating the statement of his mother's death, and also informing him of the amount of money which she had left him. This letter had been addressed to Holmes in the care of M. E. Hill. After reading it, Holmes handed the letter to Hill and requested him to read it, which he did. Hill then took Holmes home with him to his house, after stopping and getting their dinner at a temporary eating house. Holmes continued to live at Hill's house, eating at the family table and sleeping with Mr. Hill's son, from the 23d day

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of November until the 21st day of February, when Holmes and Hill left for London. Before leaving Beatrice they entered into and executed the first or principal contract.

Holmes, in his testimony given in his own behalf, states the conversation and narrates the circumstances which led up to the making of the arrangement by which Hill accompanied Holmes to London and acted as his attorney in settling up his deceased mother's estate. These circumstances and conversations are claimed by plaintiffs as undue influences exerted by Hill upon Holmes, whereby he was induced to enter into the contract. The marked difference in the bearing of Hill towards Holmes after his return from Birmingham, together with his assistance in enabling him to return, taking him into his house and family, and keeping him there until his return to London, and accompanying him thither, are pointed to as evidence of such influence. It is perhaps sufficient to say that the trial court appears not to have seen, nor do we, that evidence of fraud, unfairness, or design on the part of Hill in any of these transactions, nor of surprise, imbecility, or weakness on the part of Holmes, sufficient to avoid the contract between them, or which have characterized the cases where courts of equity have felt warranted in interposing between the strong and the weak.

Nearly all of the cases cited by counsel for the plaintiffs are where persons of advanced age, or whose minds have become enfeebled by sickness, have become the victims of designing relatives or persons upon whom they had a natural right to look for protection. An exception is furnished in the case of *Moore v. Moore*, 56 Cal., 89. In that case the plaintiff was the wife of one William H. Moore, with whom she lived and cohabited when he was killed by being shot. She was shown to have been in delicate health by the fact that she was delivered of a child within four months of the death of her husband. The sudden killing

of her husband caused her a great shock and prostration of mind and body, and unfitted her for the transaction of business. On the second day after the burial of her deceased husband, and before she had recovered from the shock which his death had occasioned, she was waited upon by two brothers and two brothers-in-law of her late husband, who were accompanied by an attorney and notary. They presented to her, and requested her to sign, the instruments which the action was afterwards brought to avoid. She was told by one of the brothers of her late husband that it was his wish that she should sign them, and thereupon without reading or knowing the contents of them, and without any negotiation as to the price to be paid, or any agreement or understanding in relation to any consideration for her doing so, she signed three instruments by which she transferred to the surviving children of her late husband her entire interest in his estate. The estate transferred was of the value of \$47,000. The court overruled a demurrer to the petition setting out the above facts, stating the salient facts of the case to be, "That the transfer was made without negotiation, explanation, or any conceivable adequate motive. The time selected for the transaction, in view of her then recent bereavement, and the shock which such an event would naturally inflict upon her, was at least malapropos. She alleged that she was suffering at the time from the effects of the shock which she had sustained by her late husband's death. She also alleges that she did not read and was not informed of the contents of the instruments which she signed."

In the above case the court went farther than in any other to which my attention has been directed, but it falls far short of that which is contended for here.

I come to the conclusion that neither on account of inherent unfairness or inequality in the terms of the contract itself, of mental imbecility, immaturity, or unsoundness on the part of Holmes, nor of undue influence by reason of the

personal relations of the parties, is the first or principal contract successfully attacked, and the opinion and decree of the district court in upholding the same must be affirmed.

The findings and decree of the district court upon the remaining and minor questions involved in the case are mainly in favor of the plaintiffs, and as the defendant did not perfect his appeal, they will not be examined.

The court, however, found and decreed in favor of the validity of the deed of trust executed by Holmes and wife to Hill, trustee, under date of February 23, 1885, in so far as the same is in furtherance of the original contract, but not in so far as the same sought to create other and additional trustees in case of the death of E. M. Hill, trustee. In this I think there was no error.

The decree of the district court is affirmed.

DECREE AFFIRMED.

THE other judges concur.

22	437
31	673
22	437
51	32
22	437
159	626
22	437
61	880

COUNTY OF DAKOTA ET AL., PLAINTIFFS IN ERROR, V.
WILLIAM CHENEY, DEFENDANT IN ERROR.

1. **Ditches and Drains: JURISDICTION OF COUNTY BOARD.** In a proceeding to establish a drain or ditch, under chapter 89 of Compiled Statutes, the jurisdictional facts are, first, a petition signed by one or more owners of land to be affected by the proposed ditch; second, the bond provided by statute; third, that the proposed improvement is necessary, and will be conducive to the health, convenience, and welfare of the public; and fourth, the statutory notice.
2. ———: ———. The failure of the county board to find that the signers of the petition are owners of lands to be affected is not jurisdictional.

3. ———: ———: OBJECTIONS. A party objecting to the construction of a proposed ditch should act with reasonable promptness in urging his objection, and should not wait until the completion of the improvement before alleging an entire want of authority to make the same.

ERROR to the district court for Dakota county. Tried below before CRAWFORD, J.

M. C. Jay, Barnes Brothers, and John T. Spencer, for plaintiffs in error, cited: *Patterson v. Baumer*, 43 Iowa, 477. *Jenal v. Green Island Draining Co.*, 12 Neb., 163. *Bate v. Sheets*, 64 Ind., 209. *Keys v. Williamson*, 31 Ohio St., 561.

D. A. Holmes, for defendant in error, cited: *Willis v. Sproule*, 13 Kan., 257. *Commissioners v. Muhlenbacker*, 18 Kan., 132.

MAXWELL, CH. J.

This is a proceeding in error from the judgment of the district court of Dakota county, reversing the order of the board of county commissioners of that county in establishing and constructing a ditch in pursuance of statutory authority.

The record shows that on the 7th day of October, 1884, a petition was presented to the county commissioners of that county, as follows:

"To the County Board of Dakota County:

"The undersigned, owners of land lying and being in that part of Dakota county know as the swamp, would respectfully represent to your honorable board that all lands situated in said swamp are, at present, of small value to the owners thereof, and would further represent that a drain, commencing at or near the south-east corner of the N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of section 12-28-7; thence in a south-easterly direction, along the lowest ground, to a

point about one hundred rods east of the quarter corner of east side of section 13-28-7; thence south-easterly, along and through the lowest ground, to the head of Wm. Taylor's ditch, or some point in or along said ditch, as found necessary, with side or lateral ditches when necessary, would render all the lands so situated of much greater value to the owners, and would be of vast benefit to the people of said county, and for public good.

"And would respectfully ask that your honorable board take such steps as will be necessary under the laws of Nebraska to open out a drain, commencing at or near a point suggested above, and thence along the route indicated, as near as may be practicable, to or near the head of Wm. Taylor's ditch, or some point in or along said ditch, with side or lateral ditches, as shall be found necessary, to carry off said surplus of water and drain off said lands. And your petitioners will ever pray.

"JOHN HARTNETT,	JOHN COLLINS,
J. F. DUGGAN,	FRANK HEENEY,
JOHN DUGGAN,	MIKE MALONEY,
JOHN HEFFERMAN,	DANIEL HARTNETT,
MICHAEL CAIN,	DANIEL DUGGAN,
P. REELEY,	JOHN HOWARD,
A. LAHEY,	P. W. BRIDENBAUGH,
JAS. HOGAN,	JOHN ROONEY,
P. KEEFE,	JAS. DUGGAN,
JAS. LAHEY,	KELLEY W. FRAZER."

The commissioners thereupon entered the following on their record:

"In compliance with the prayer of the petition of John Hartnett and others for the location of a ditch from the south-east corner of the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 12-28-7; thence in a south-easterly direction, along the lowest ground, to a point about 100 rods east of the quarter corner of the east side of section 13-28-7;

thence south-easterly, along the lowest ground, to the bed of William Taylor's ditch, or some point in said ditch, with side or lateral ditches where necessary. The undersigned on the 24th of September, 1884, proceeded to view the line of said proposed improvement, and, upon actual view of the premises along and in the vicinity thereof, we find* that said improvement is necessary and will be conducive to the public health and welfare, and also find that the line described in said petition is the best route for said ditch, except that we find that the starting point of said ditch should be the half section line running east and west of section 12-28-7. We, therefore, hereby order the clerk of said county to enter this finding upon the commissioners' journal.

"We, therefore, direct the county surveyor to go upon said line described in said petition, and survey and level the same, and set stakes at every one hundred feet, numbering down stream, and note the intersections of section lines, road crossings, boundary lines, precinct and county lines, and make a report, profile, and plat of the same, and estimate the number of cubic yards for each working section of said drain, and to make and return a schedule of all lots, lands, public or corporate roads, or railroads that will be benefited by the proposed improvement, and proportion the line in feet and cubic yards to each lot, tract of land, road, or railroad, according to the benefit that will result to each from the improvement, and make an estimate of the cost of location and construction to each, and a specification of the manner in which the improvement shall be made and completed."

At an adjourned meeting of the county commissioners, held at Dakota City, Nebraska, March 19th, 1885, the following proceedings were had:

"And now, at this time, to-wit: March 19, 1885, it being an adjourned meeting of the board of county commissioners of Dakota county, Nebraska. In the matter of

draining the swamp in said county, which has been before them heretofore.

"It is considered and ordered by said commissioners, upon actual view, that the drain be made fourteen feet on the top of said ditch and ten feet at the base of the same, and estimates be made upon that basis."

And at a meeting held March 31st, 1885, the following proceedings:

"Now, at this time, to-wit: March 31st, 1885, it being an adjourned meeting of the board of county commissioners of Dakota county, Nebraska.

"Whereas, it appears that at the last meeting of said board, to-wit: the 19th day of March, 1885, the said board having under consideration at that time the dimensions of the ditch petitioned for in said county, it was then ordered that the same be fourteen feet wide on top and eight feet on base; and

"Whereas, it appears that a mistake was made in the entry of said order, it is now ordered that said entry be changed to read as follows: Width of ditch on top, fourteen feet, and width of ditch at base, ten feet, as intended in the order of March 19th, 1885."

At a meeting of said board held April 7th, 1885, the following proceedings:

"And now, at this time, to-wit: the 7th day of April, 1885, it being an adjourned meeting of the board of county commissioners of Dakota county, Nebraska. In the matter of the swamp improvement in said county, it appearing to said board that a mistake was made in the order of September 25th, 1884, establishing the route of said ditch, in this, that the starting point of said ditch is described as on the half section line running east or west of section 12, township 28, range 7 east. Whereas, the order was intended to locate the starting point of said ditch where the channel of Elk creek crosses said line. And, whereas, the engineer of said improvement, after the

survey of said ditch, finds that the starting point as so intended by said board was ten chains and six links north and two chains east from the south-west quarter of section 12, township 28, range 7, and it is hereby ordered by said board that the records be corrected to show that the starting point of said ditch be north of said line ten chains and sixty links, and two chains east from the south-west corner of the south-east quarter of the north-west quarter of section 12, township 28, range 7 east, as shown by the survey of said engineer, now on file in the office of the clerk of said county.

"Now, at this time, to-wit: the 7th day of April, 1885, it being an adjourned meeting of the board of county commissioners of Dakota county, Nebraska. In the matter of the swamp improvement of said county, it appearing to said board that the report and plat of the engineer of said improvement has been duly filed in the office of the county clerk of said county, and that the same was filed within thirty days after the survey of said route of said improvement was made.

"It is hereby ordered and considered, that the county clerk of Dakota county proceed at once to notify the owners of all the lands affected by said improvement, residents and non-residents, in the manner provided by law, to appear before the said county board on the 14th day of May, 1885, or to file within that time all objections to the location of the same, or for damages, in any way they may feel aggrieved, to make the same known within said time.

"Adjourned to meet May 14th, 1885."

On that date the following, among other proceedings, were had:

"Now, at this time, to-wit: May 14th, 1885, it being an adjourned meeting of the board of county commissioners of Dakota county, Nebraska. In the matter of the Dakota county ditch, this being the day fixed by the

county clerk of said county for the hearing of the report of the engineer, heretofore filed in the matter, the commissioners now in session do find from the evidence and proof of publication of notice in said county, relating to the lands and roads therein, and returns made by the sheriff on said notice served in Dakota county, that due and legal notice has been given, according to law, to the resident and non-resident parties who are the owners of lots and lands taken or affected by said proposed improvement, or by the apportionment and report of the engineer, situated in said Dakota county, as well as the authorities and municipal and private corporations whose lands or roads are affected by said proposed improvement. And now, from the affidavit of the publishers of the *North Nebraska Eagle*, a newspaper published in Dakota county, the commissioners do find that due and legal notice has been given to all non-resident lot or land owners whose lands or property is affected by said improvement. And now, on the same day, to-wit, May 14th, 1885, the said board of county commissioners of said county, after finding that due and legal notice had been made of the hearing of the report of the engineer in said ditch matter to all lot and land owners, resident and non-resident, whose lands are affected by said ditch improvement, in all respects is in accordance with law.

“The said board of commissioners do now proceed to hear the evidence in favor of and to examine all exceptions filed in said matter to the apportionment of the engineer, and to claims filed, as well as to hear and examine all claims for compensation or damages filed herein.”

The board thereupon proceeded to examine the claims and objections of various land owners affected by the construction of the ditch. Then follows a statement of the several claims considered, but as such parties are not complaining, it is unnecessary to set out the proceedings in this case. Cheney, the defendant in error, also filed

claims and objections, which are set out in the record, as follows :

"STATE OF NEBRASKA, } ss.
DAKOTA COUNTY, }

" *To the Honorable Board of Commissioners of Dakota County, Nebraska:*

"In the matter of a certain ditch or drain proposed to be made in the said county of Dakota, your petitioner, William Cheney, would respectfully enter the following objections:

"1. That said improvement or ditch is not for the public benefit, and the statute under which the proceedings for the construction of said ditch was instituted is unconstitutional and void.

"2. That the assessments on the lands to be drained by said ditch are not in proportion with the benefits derived by the construction of said ditch.

"3. That the ditch or drain proposed to be built is larger than required for the draining of the lands to be benefited, and does not drain all the lands assessed.

"4. That the land owned by your petitioner, to-wit: The S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, and N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, and N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ and S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 22, town 28, range 8 east, is now in pasture, and does not require to be drained, and such a drain or ditch would be a damage to said land.

"Filed May 13th, 1885.

"WILLIAM CHENEY."

His objections were overruled and the ditch completed.

On the 12th day of May, 1886, Cheney filed his petition in error in the district court of Dakota county, to reverse the aforesaid order of the county board in regard to said ditch, in which he made thirteen assignments of error. On the hearing of the cause the court found, "That there is error in said judgment and proceedings in this: Because said board of commissioners had no jurisdiction of

the subject-matter in controversy and no authority to make the order therein made or the judgment therein rendered." The court thereupon entered judgment reversing the order of the board.

The county brings the cause into this court by a petition in error. The only question before this court is, whether or not the county board had jurisdiction of the subject-matter.

Section 4, Art. I., of Chapter 89, Comp. Stat., provides that, "A petition for any such improvement shall be made to the board of commissioners of the county signed by one or more owners of lots or lands which shall be benefited thereby, which said petition shall be filed with the county clerk, and shall set forth the necessity of the proposed improvement, and describe the route and termini thereof with reasonable certainty, and shall be accompanied by a good and sufficient bond, signed by two or more sureties, to be approved by the county clerk, conditioned for the payment of all costs that may occur in case said board of county commissioners find against such improvement."

Sec. 5 provides that, "The county clerk shall deliver a copy of said petition to the board of county commissioners, at their next meeting, who shall thereupon take to their assistance a competent surveyor or engineer, if in their opinion his services are necessary, and at once proceed to view the line of the proposed improvement, and determine by actual view of the premises along and in the vicinity thereof, whether the improvement is necessary or will be conducive to the public health, convenience, or welfare, and whether the line described is the best route, and they shall report their finding in writing, and order the clerk to enter the same on their journal."

SEC. 6. "If the commissioners, upon actual view, find that the route proposed is not such as to best effect the object sought, they shall change the same and establish the route and determine the dimensions of the proposed im-

provements; *Provided*, Any change so made shall not in any case exceed one hundred and sixty rods from the route described in the petition."

SEC. 7. "If the board of commissioners find for the improvement they shall cause to be entered on their journal an order directing the county surveyor, or an engineer, to go upon the line described in said petition or as changed by them, in accordance with section six, and survey and level the same, and set a stake at every hundred feet, numbering down stream; note the intersection of section lines, road crossings, boundary lines, precinct and county lines, and make a report, profile, and plat of the same, and estimate the number of cubic yards for each working section, as hereinafter provided."

SEC. 8. "The commissioners shall also by their order direct the surveyor or engineer to make and return a schedule of all lots, lands, public or corporate roads or railroads, that will be benefited by the proposed improvement, whether the same are abutting upon the line of the proposed improvement or not, and an apportionment of a number of lineal feet and cubic yards to each lot, tract of land, road or railroad, according to the benefits that will result to each from the improvement, and an estimate of the cost of location and construction to each, and a specification of the manner in which the improvement shall be made and completed."

There are other sections of the statute to which it is unnecessary to refer. The bond required by the statute was given and duly approved, and is set out in the record. The principal objection made by the defendant in error is, that the board did not find that the petitioners were owners of the land to be affected by the proposed ditch. This fact, however, may be gathered from the petition, and the statute does not make a finding of that kind jurisdictional. If the petitioners were not owners of lands affected by the ditch the defendant in error should have made his objec-

tions to the board and thereby called their attention to the fact that they were proceeding without jurisdiction. His failure to make such objection to the board is strong evidence that he could not truthfully so allege. The jurisdictional facts are: 1st, the petition signed by one or more landowners to be affected by the proposed ditch; 2d, the undertaking required by the statute; 3d, that the proposed improvement is necessary, and will be conducive to the health, convenience, and welfare of the public; and 4th, the statutory notice. All these facts sufficiently appear in the record of the county board, and were sufficient to give it jurisdiction. If errors occur in the proceedings they may be corrected in the mode pointed out by the statute. A party, however, who objects to the construction of a proposed ditch upon the ground of want of jurisdiction of the board, should proceed with reasonable promptness in asserting his objections. He should not wait until the ditch is completed, and be enabled to receive all the benefits to be derived therefrom before asserting such want of authority.

The district court erred in reversing the order of the county commissioners, and its judgment is reversed, the order of the board reinstated, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

THE STATE, EX REL. SOCIETY FOR SAVINGS OF THE
CITY OF CLEVELAND, v. THE COUNTY OF DAKOTA
AND G. W. WILKINSON, TREASURER.

ORIGINAL application for mandamus.

J. M. Woolworth, for relator.

Poppleton & Thurston, for respondent.

MAXWELL, CH. J.

This is an application for a writ of mandamus to compel the defendants to pay certain coupons of the refunding bonds of Dakota county. On motion of the respondent, a proper petition and bond having been filed, the cause was removed to the United States circuit court of this state, and by that court remanded to this court for want of jurisdiction. The questions involved are identical with those decided by this court in *State v. Wilkinson*, 20 Neb., 610; and, as in our view that decision states the law correctly, it will be adhered to. A peremptory writ will issue, as prayed for in the petition, commanding the payment of the amount due on the unpaid coupons.

JUDGMENT ACCORDINGLY.

THE other judges concur.

22	449
51	757

OMAHA MEDICAL COLLEGE, APPELLANT, V. JOHN RUSH
AND TRUMAN BUCK, APPELLEES.

22	449
50	573

1. **Schools: CONSTRUCTION OF STATUTE.** The word "school" in Sec. 2, Art. 1., Chap. 77, Comp. Stat., means an institution of learning, and is not limited to the lower grades of schools.
2. ———: **EXEMPTION FROM TAXATION.** Property used exclusively as an institution of learning is not subject to taxation while thus used.

APPEAL from the district court of Douglas county.
Heard below before WAKELEY, J.

Savage, Morris & Davis, for appellant, cited: *Asylum v. Phoenix Bank*, 4 Conn., 173. *St. Mary's College v. Crowl*, 10 Kan., 442.

John L. Webster, for appellee, cited: *Academy of Fine Arts v. Philadelphia County*, 22 Penn. State, 496. *Wyman v. St. Louis*, 17 Mo., 335. *Chegaray v. Mayor*, 13 N. Y., 220.

MAXWELL, CH. J.

This is an action to enjoin the collection of certain taxes levied upon the property of the plaintiff in the year 1882. On the trial of the cause in the court below judgment was rendered in favor of the defendants. The plaintiff appeals.

The plaintiff alleges in its petition that it "is a corporation, duly incorporated under the laws of the state of Nebraska, for the purpose of organizing and maintaining a school for the teaching of the science of medicine and surgery; that for the purpose of the better promotion of the objects for which it was incorporated, it secured the title, on or about the 28th day of June, 1881, and now owns and occupies lots 1 and 2 in block 230 in the city of Omaha, as

surveyed and lithographed, and erected thereon for the exclusive use of said school, and for the promotion of the objects thereof, a large building and the necessary adjuncts thereto; that the said building is located and built upon both of said lots, and that the said lots are no more than is necessary and required for said purposes; that since the erection of said building upon said lots the same have been occupied and used exclusively for the purposes of said school; that the said building was erected on said lots and completed ready for use on or about the month of September, 1881, and has ever since that time been devoted solely and exclusively to the use of said school; that in the year 1882, the said lots with the said buildings thereon were placed by the commissioners of said county, or under their direction, upon the tax list of said county, and that they levied thereon state, school, and county taxes to the amount of \$41.40 for the said year 1882; and that the city authorities of said city caused said lots to be entered upon the tax lists of the city of Omaha for said year, and levied thereon taxes to the amount of \$54, for city purposes of said city of Omaha, for said year of 1882; that the said John Rush is county treasurer of said county of Douglas, duly elected and qualified, and that the said Truman Buck is the city treasurer of said city of Omaha, duly elected and qualified; that the said taxes so levied as aforesaid for city purposes for the year 1882, not having been paid, and the same having become delinquent, the said defendant, Truman Buck, as city treasurer as aforesaid, returned the said lots above described in the delinquent list which he was by law required to make out and return to the county treasurer of said county for the purpose of enforcing said city taxes, together with the state, county, and school taxes so levied as aforesaid, by the sale of said lots, and the said defendant, John Rush, as county treasurer as aforesaid, now holds said delinquent list and threatens to sell the said lots for said delinquent city taxes for said year 1882, and

Omaha Medical College v. Rush.

also threatens to sell said lots for the delinquent state, county, and school taxes, so levied as aforesaid, for said year 1882, the said state, county, and school taxes not having been paid, but having become delinquent; and plaintiff fears that the said defendant, John Rush, as such county treasurer, will, unless restrained by the injunction of this court, sell said real estate for said delinquent taxes and thereby cast a cloud upon the title of the said plaintiff thereto; that the said lots are exempt from taxation under the constitution and laws of this state," etc. There are other allegations in the petition to which it is unnecessary to refer.

The defendants in their answer deny that said premises are occupied as a school for the purpose of teaching the science of medicine and surgery, and allege that it is incorporated as a joint stock company for the purpose of establishing a medical college, and has issued shares of stock, and that the property is used for the purpose of a medical college and other purposes, and that all students pay a certain amount each term for their instruction.

On the trial of the cause one Dr. R. C. Moore testified: "I am a physician and surgeon; am president of the board of trustees of the Omaha Medical College; the college owns the property described in the petition on which is the college building; it is used for a medical college for instruction in medicine, for nothing else; the company owns the property; it is not occupied for anything more than the necessary services or usages to which a medical college is usually put." On cross-examination he testified: "The admission, tuition, and instruction of the students are regulated by the board of trustees by resolution, also the ordinary transaction of business, the fees, the announcements, etc. We issue an announcement every year; do not know whether I have one for the year these taxes were levied or not; think I have one at my office; it was the same as in 1883; it was then used as a medical college; in

conducting the medical college we take any man who is the proper age and has the proper educational qualifications as a student; they pay a matriculation fee of \$5, that is the entrance fee; then we have lecture fees, \$35 per term; the term usually commences about the first of October, and closes in March; from March until October the building was not used at all; some years we have a person to live there merely to look after the property, but it is not rented. It has never been rented for any purpose; virtually it lies idle from March until October; from October until March it is used for medical instruction; that has been our way ever since the institution was opened. We have two lecture rooms; they are for lectures for the students only; we have a chemical laboratory. Then we have a museum room and the janitor's room, the faculty's room, and the dissecting room, for the professor to prepare his subject, and a general dissecting room for the students; the dissecting rooms are not used for the private benefit of the medical fraternity; they are used only for the benefit of the students. It requires three years to graduate. The matriculation fee is paid but once, the other fees annually; the student also pays \$10 for a dissecting ticket and \$5 for a hospital ticket; that gives him the privilege of clinics in St. Joseph's hospital, and goes to the hospital; we furnish the material for dissection; we furnish it at cost to the students; we get a body and keep an account of what it costs, and each student pays his share for what we expend on the subject. The whole institution is used for these purposes. Each professor furnishes his time, we get no pay for it; the instruction in a general way consists of teaching the science of medicine and surgery in all its branches. The fees are used for paying the expenses of the institution, the janitor, fuel, and running expenses of the college; the professors receive no part of them; when we first opened we had to bring here a professor of chemistry, and had to pay him a salary for lecturing; that was

paid out of the proceeds of the college; he is the only man that has ever been paid. No professor ever had an office in the building; we have chairs in our amphitheatre for about eighty students, and in our dissecting room could accommodate about forty or fifty; the average attendance has been about thirty; we never have paid any dividends on stock; none of the money received from the students has been used to pay a dividend to the stockholders."

This is all the testimony in the case except the articles of incorporation.

Section 2, Art. I., Chap. 77, Comp. Stat., provides that, "The following property shall be exempt from taxation in this state: *First*, The property of the state, counties, and municipal corporations, both real and personal. *Second*, Such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery, and charitable purposes."

The sole question for determination is, was the property in question at the time the tax was levied used exclusively for school purposes? The first definition of the word "school" given by Webster is, "a place for learned intercourse and instruction; an institution for learning; an educational establishment; a place for acquiring knowledge and mental training."

The defendants contend with considerable earnestness that the "school purposes" mentioned in the statute apply only to the lower grade of institutions of learning, and do not include higher institutions like colleges. We can see no good reason for thus limiting the meaning of the words mentioned. An examination of any work in which the subject is fully discussed will show that the word "school" in its broad sense is applied to any institution of learning; and it evidently is used in that sense in the statute. The exemption, therefore, applies to any institution of learning used exclusively for school purposes. The exemption is expressly declared in the statute and the court should not

State v. Seavey.

without good reason limit or restrict the right. The property in question, therefore, was exempt from taxation for the year named, and the injunction should have been granted.

The judgment of the district court is reversed, and judgment in favor of the plaintiff will be entered in this court.

JUDGMENT ACCORDINGLY.

THE other judges concur.

22	454
22	470
22	454
36	26
22	454
45	737
22	454
52	226
55	516
55	520
55	523

THE STATE, EX REL. EDWARD W. SIMERAL, COUNTY ATTORNEY, V. WEBBER S. SEAVEY.

1. **Cities of Metropolitan Class: CHIEF OF POLICE.** The appointment of the respondent, as chief of police of the city of O., by the board of fire and police commissioners appointed by the governor under section 145 of an act entitled "An act incorporating metropolitan cities, and defining, regulating, and prescribing their duties, powers, and government," approved March 30, 1887, under the facts and circumstances as set out in the answer, *Held*, A legal appointment within the scope and meaning of the said act.
2. — : **CONSTITUTIONAL LAW.** The provision of the above mentioned act, whereby it is made the duty of the governor to appoint a board of fire and police commissioners for each city of the metropolitan class; *Held*, Not to be repugnant to the constitution.

ORIGINAL information in *quo warranto*.

E. W. Simeral, G. W. Ambrose, and J. C. Cowin, for relator, cited: *People v. Hurlbut*, 24 Mich., 44. *People v. Forquer*, Breese (Ill.), 104. *People v. Board*, 25 Mich., 153. *People v. Mayor*, 51 Ill., 17. *Village of Glencoe v. People*, 78 Ill., 382. *People v. Detroit*, 28 Mich., 228.

George B. Lake, for respondent, cited : *Baltimore v. Board of Police*, 15 Md., 376. *People v. Draper*, 15 N. Y., 532.

COBB, J.

This is an original proceeding in this court, by Edward W. Simeral, county attorney of Douglas county, relator, against Webber S. Seavey, respondent.

The complaint is, in substance, an information in the nature of a *quo warranto*; its general object, to obtain a judgment against the respondent upon his right to execute the office of chief of police of the city of Omaha. It alleges that the city of Omaha is a city of the metropolitan class; that under and by virtue of the laws governing cities of the metropolitan class, there was appointed by the governor a fire and police commission, consisting of four persons; that the members of said board of fire and police commissioners at and before the time thereafter set forth neglected and refused to enter into a good and sufficient bond for the faithful performance of their duties, as the ordinances of said city required, and long before any bond was approved by the authorities of said city, said commissioners pretended to and did proceed to make appointments of firemen and policemen; that at the times thereafter set forth no rules and regulations governing said board of fire and police commissioners had been prescribed by ordinance by the mayor and council of said city; that on the 19th day of May, 1887, said defendant was by said board of fire and police commissioners appointed chief of police of said city of Omaha, but that at the time of said appointment the bonds of said commissioners had not been approved by said city council, nor had any rules and regulations by ordinance been adopted by said council governing the removal and appointment of chief of police, and that said commissioners, without law

or authority, removed Thomas Cummings, who, at that time, was acting as chief of police, and appointed in his stead said defendant, whom, petitioner alleges, is now and has been ever since his pretended appointment, wrongfully and unlawfully exercising and usurping the functions of said office, and that said council has never approved or confirmed the said appointment of said defendant as by law required.

By way of amendment, said relation also alleges that before the passage of the act entitled "An act to incorporate metropolitan cities," etc., approved March 30, 1887, the city of Omaha was a city of the first class, under the laws of the state of Nebraska then in force with respect thereto; that when said act relating to metropolitan cities took effect the city of Omaha had a police force and a city marshal as then provided by act with respect to cities of the first class and ordinances of the city of Omaha thereunder; that the legislature adjourned *sine die* on the first day of April, 1887, and said legislature has not been in session since; that the said appointments made by the governor, as aforesaid, were made after the adjournment of said legislature, and the appointments were not made with the advice and consent of the senate; that the said appointments were, therefore, unconstitutional and void; that the offices to which said appointments were pretended to be made were original offices and original appointments, and not a vacancy or appointment to fill a vacancy.

That the said pretended board of fire and police have appointed a large number of police for said city, that at the time of the pretended appointment and reappointment of said defendant herein, the said Cummings was acting as chief of police, and all other policemen continued in their office; and at the time of the pretended appointment and reappointment of said defendant and the appointment of said policemen there were no funds whatever provided by the

mayor and council to pay the salary of said defendant or the salary of said other policemen, and at no time since the passage of the act with respect to metropolitan cities have there been any funds whatever provided by the mayor and council to pay the salary of said defendant, or the salaries of said policemen ; and that at the time of the appointment of the defendant, and of the other policemen by said board, the mayor and council of said city, under the law, could not provide any funds to pay such salaries, as the full extent of their authority, when exercised in behalf of raising a police fund, realized only a sufficient amount to pay the salaries of the policemen then in office, and the number appointed by said board far exceeded the amount of funds for salaries which it is possible for the mayor and city council to provide under the law, etc.

The respondent entered a voluntary appearance and answered. I quote from the answer as the foundation of respondent's claim to the said office.

"First. He admits that under and by virtue of the law of the state of Nebraska governing metropolitan cities there was duly appointed, by the governor of said state, a fire and police commission, consisting of four persons, viz.: L. M. Bennett, Christian Hartman, George I. Gilbert, and Howard B. Smith. And in this behalf the defendant alleges that under said law the mayor of the city of Omaha became and is *ex-officio* a member and the chairman of said board ; that shortly after their said appointment to said board on the 10th day of May, 1887, the said Bennett, Hartman, Gilbert, and Smith each took and subscribed an oath to support the constitution of the United States, the constitution of the state of Nebraska, and faithfully and impartially perform the duties of the office of commissioner of fire and police, according to law, and to the best of his ability ; and, also, that he would to the best of his ability discharge his duties as a member of the board of fire and police of the city of Omaha, and that in making appoint-

ments, considering promotions or removals, he would not be guided or actuated by political motives or influences, but would consider only the interests of the city and the success and effectiveness of said department of fire and police; that said oaths were filed with the city clerk of said city May 10, 1887, whereupon said Bennett, Hartman, Gilbert, and Smith, together with the mayor of said city, organized said board and entered upon the duties thereof, which they have ever since continued to perform.

"Second. That at the time of the appointment and qualification as aforesaid of the members of said board, there was no law or ordinance of said city requiring of them official bonds; that the first requirement of this kind was by ordinance of said city approved June 15, 1887; that immediately after the passage and approval of said ordinance requiring such bonds, all of the said commissioners appointed as aforesaid gave good and sufficient bonds in exact compliance with the requirements of said ordinance; that the bonds of said Bennett and Hartman were approved by said city council on or about the 9th day of August, 1887, while those of said Gilbert and Smith were rejected, for the sole reason that the names of the sureties who had signed the bonds respectively did not also appear in the body of those instruments as well; that immediately upon the rejection of the bonds of said Gilbert and Smith for this technical reason, they each filed new bonds, obviating said objection, and in all respects complying with the requirements of said ordinance in this regard; that notwithstanding these new bonds were duly presented to said city council August 30, 1887, that body has failed, up to the present time, either to approve or reject them.

"Third. That while it is true, as relator alleges, that no rules and regulations for the government of said board of fire and police commissioners have been prescribed by an ordinance of said city, yet it is true that the said board of fire and police commissioners did, on the 16th day of

May, 1887, prepare and adopt certain rules and regulations for the guidance of the officers and men of the fire and police department of said city, and for the appointment, promotion, removal, trial, and discipline of said officers and men, and such as said board considered proper and necessary, which said rules and regulations were by said board duly submitted to said city council for its action on the 17th day of May, 1887, but respecting which the said city council has, as yet, taken no action, either of approval or rejection.

"Fourth. That defendant was appointed chief of police of said city by said board, at or about the time alleged in the petition, and before the members of said board had given their bonds as aforesaid; that at the time he was so appointed he alleges there was no law requiring, as a requisite of qualification, that they should give bonds, nor was there any ordinance of said city to that effect until long after said appointment of defendant was made. And defendant also admits that the said city council has never appointed or confirmed the appointment of said defendant to said office of chief of police of said city, the duties of which he is now exercising, under and by virtue of the appointment made as aforesaid," with a general denial of all of the other allegations of the petition.

There was no other pleading filed in the case, but the cause was argued at the bar as upon demurrer to the answer.

A general demurrer to the answer presents the following question: Was the appointment of the respondent by the board of fire and police commissioners of the city of Omaha to the office of chief of police of said city, under the facts and circumstances of the case as set up in the answer, legal?

In discussing this question I will premise by saying that at the time of the passage and approval of the act entitled "An act incorporating metropolitan cities and de-

fining, regulating and prescribing their powers and government," Omaha was a city of the first class, organized and existing under and having for its charters an act entitled "An act to incorporate cities of the first class and regulating their powers, duties, and government," approved March 1, 1881, together with certain amendments thereto, all constituting chapter 13 of the Compiled Statutes of 1885.

The act first above referred to was not an amendment, but an independent statute designed to be perfect in itself, and by its 173d section repealed the act last above referred to, and all acts amendatory thereof, as well as all acts and parts of acts in conflict therewith. It contains an emergency clause, and therefore took effect and became of force immediately upon its passage.

By the terms of the first section the said act is made to apply to all cities of the state now having a population of sixty thousand inhabitants or more, as shown by the state census of 1885, and all cities which shall hereafter have attained a population of sixty thousand inhabitants, or upwards. The second section provides in what manner such cities as shall hereinafter have attained the necessary number of inhabitants shall be brought within the operation of said act.

There is no provision of said act in terms continuing any officer or policeman appointed under the former charter in office under the new one, but they would doubtless so continue upon general principles of law and by necessity, until the election or appointment of their successors, under the new charter. But with this qualification it is clearly the intent and within the scope of the act to establish a new government for the class of cities thereby established.

Section 145 is devoted to the establishment of a department of fire and police for the new class of metropolitan cities, and is in the following words :

"In each city of the metropolitan class there shall be a board of fire and police, to consist of the mayor [who shall be *ex officio* chairman of said board] and four electors of said city, to be appointed by the governor. The governor shall appoint as the commissioners above four citizens, not more than two of whom shall be of the same political party. Two of them of different political party faith and allegiance shall be designated in their appointment to serve for two years, and the other two, also of different political party faith, shall be designated to serve for four years. And, thereafter, at the expiration of said term, and each period of two years, the governor shall appoint two members of said board.

"For official misconduct the governor may remove any of said commissioners; and all vacancies in said board by death, resignation, or removal, shall be filled by the governor for the unexpired term, and all vacancies from whatever cause shall be so filled that not more than two of the members of said board shall be of the same political party, or so reputed. All powers and duties connected with and incident to the appointment, removal, government, and discipline of the officers and members of the fire and police departments of the city, under such rules and regulations as may be prescribed by ordinance, shall be vested in and exercised by said board. A majority of said board shall constitute a quorum for the transaction of business, and, in the absence of the commissioner of fire and police, the mayor shall act as chairman. Before entering upon their duties each of said officers shall take and subscribe an oath, to be filed with the city clerk, faithfully, impartially, honestly, and to the best of his ability, to discharge his duties as a member of said board, and that in making appointments, or considering promotions or removals, he will not be guided or actuated by political motives or influences, but will consider only the interests of the city, and the success and effectiveness of said departments. The board

of fire and police shall have power, and it shall be the duty of said board to appoint a chief of the fire department, an assistant chief of the fire department, and such other officers of the fire department as may be deemed necessary for its proper direction, management, and regulation, and under such rules and regulations as may be prescribed by ordinance; said board may remove such officers, or any of them, whenever said board shall consider and declare such removal necessary for the proper management or discipline, or for the more effective working or service of said department. The board of fire and police shall also employ such firemen and assistants, or may authorize the chief of the fire department so to do, as may be proper and necessary for the effective service of said department to the extent and limit that the funds provided by the mayor and council for that purpose will allow. The board of fire and police shall have power, and it shall be the duty of said board to appoint a chief of police and such other officers and policemen, to the extent that funds may be provided by the mayor and council to pay their salaries, as may be necessary for the proper protection and efficient police of the city, and as may be necessary to protect citizens and property and maintain peace and good order. The chief of police and all other police officers and policemen shall be subject to removal by the board of fire and police, under such rules and regulations as may be prescribed by ordinance, whenever said board shall consider and declare such removal necessary for the proper management or discipline, or for the more effective working or service of the police department. It shall be the duty of said board of fire and police to adopt such rules and regulations for the guidance of the officers and men of said departments, and for the appointment, promotion, removal, trial, or discipline of said officers and men, as said board shall consider proper and necessary, and when said rules and regulations shall be approved by the mayor

and council, they shall have the same force and effect as ordinances, and can only be changed by and with the consent of the mayor and council. The said board of fire and police shall have such further powers and perform such other duties as may be authorized or defined by ordinance."

There can be no doubt of the object, meaning, and intent of this section. While it is true that the act contains provisions outside of it under which the mayor and council could find authority for the establishment of a system of police and the appointment of police officers, yet it by no means follows that this section can be rejected in construing the act, nor can it be done with due regard to sound rules of construction. Our object is to arrive at the real intent and meaning of the legislature in drafting and enacting the statute. In reading it for that purpose we are not at liberty to reject any of its words, if a meaning can be attached to them consistent with the general scope and purpose of the act. But we find provisions somewhat conflicting with each other. We have seen that section 145 makes it the duty of the governor to appoint four commissioners, who together with the mayor shall constitute a board of fire and police, and it is made the duty of said board to appoint a chief of police for such city, and generally vests in said board all powers and duties connected with and incident to the appointment, removal, government, and discipline of the officers and members of the * * police department. We also find section 53 in the following language:

"SEC. 53. The mayor and council shall have power to establish, regulate, and support night watch and police, and to define the duties thereof, except as otherwise herein specially provided."

Now this a general provision which it is suggested would furnish authority for a police establishment for any city of the metropolitan class were section 145 expunged from the

statute. This, I think, would be so, and yet it by no means follows that, with both sections in the act, 145 does not contain by far the more studied, elaborate, and perfect expression of the will of the legislature. Moreover it is believed to be a sound rule of construction in law and logic, that general provisions will give way to the force of special enactment, when the latter is broad and clear enough to cover the whole ground and express the undoubted intention of the legislature.

It is urged that the appointment of fire and police commissioners, and they, acting together with the mayor, appointing a chief of police for the city, is the imposition by the state upon the city of taxes for corporate purposes, and, hence, in violation of the latter clause of section 7 of article IX. of the constitution, which reads: "The legislature shall not impose taxes upon municipal corporations or the inhabitants or property thereof for corporate purposes."

Section 79 of the act, among other things, empowers the mayor and council "to levy and collect on all such property, for the sole and exclusive purpose of maintaining and paying the police department of any such city, not to exceed five mills on the dollar valuation in any one year, taxes levied for such purpose to constitute a special fund for said purpose." And it was stated by counsel at the argument, and not denied, that the mayor and council of the city of Omaha have acted under such authority and levied a tax for the current half year sufficient to provide ample funds for the support of the police department. Section 167 fixes the salaries of officers in cities of the metropolitan class, including the chief of police. These funds will doubtless be appropriated and disbursed, and the same rate of salary paid to a chief of police, whether the respondent or any other appointee of the board of fire and police commissioners continues to fill the office, or gives way to the appointee of the mayor and council. So far as

the current half year is concerned, the tax has already been imposed by the city authorities acting under the provisions of the law, a line of action which does not seem to have been rendered either more or less necessary by reason of the peculiar provisions of section 145, or the action of the state, or of any of its officers or appointees thereunder.

Section 145 also provides that before entering upon their official duties the said commissioners of fire and police shall take, subscribe, and file with the city clerk a certain and peculiar official oath therein prescribed. The section does not provide that they shall give an official bond. In the answer it is alleged that at the time of the appointment of respondent by the said board there was no ordinance of said city requiring the members of said board to give bonds. This allegation standing as a demurrer, is taken as true.

It is contended by counsel for the relator that the appointment of the members of the board of fire and police commissioners by the governor is void, for the reason that such appointment was not made by and with the advice and consent of the senate, and to this point section 10 of article V. of the constitution is cited. Said section is as follows:

"SEC. 10. The governor shall nominate, and by and with the advice and consent of the senate (expressed by a majority of all the senators elected, voting by yeas and nays), appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise by law or herein provided for, and no such officer shall be appointed or elected by the legislature."

The language of the act is, "The governor shall appoint," etc., without the qualification that such appointment shall be dependent upon the advice and consent of the senate. These officers' offices are created by law, but their appointment is by law otherwise provided for than in the mode

pointed out in the section of the constitution quoted. The contention is, that it would be competent for the statute to have designated some other officer or person to make these appointments, in which case the advice and consent of the senate would not be required, but that it is incompetent for a statute to clothe the governor with power to make appointment of any officer, without such qualification and restriction. I know of no reason, nor has any been suggested, for this distinction. And while the argument *de conveniance* may not be admissible in discussing a constitutional question, some consideration is due to the general understanding and practice in this state, where it will not be denied that, throughout its history, not a session of the legislature has passed without the passage of laws in terms similar to the one now under consideration, and their execution by the governor without submitting his appointments to the senate. I need only instance the cases of notaries public, the officers of the military staff, and the several district judges whose appointment have become necessary to supply the new judicial districts, and the additional judges to old ones, as from time to time provided by law.

It is further objected that the legislature has no power to make party affiliation a qualification for office. Speaking for myself alone, I am quite inclined to agree with counsel in this objection, and yet I think that the language of the act out of which this objection springs must be regarded as directory merely; that it spent its entire force upon the governor, and that the appointments made by him under the provisions of the section where such language occurs are neither more nor less legal, to whatever party, or no party, such appointees or either of them belong.

In the case of *The People v. Hurlbut*, 24 Mich., 93, cited by counsel for the relator, Judge Cooley, in delivering his opinion, speaking upon a branch of said case

involving a question almost identical with the one we are now considering, said: "Nor can the whole act be void because of the provision that the appointees under it shall be members of two certain political parties. That provision, so far as it was designed to control appointments for the future, is simply nugatory, because the legislature on general principles have no power to make party affiliation a qualification for office. But so far as the provision can be regarded as a declaration that the appointees named have been selected because they sustained the specified party relations, we need only say that where a right of choice exists, an election cannot be held void because of the reasons assigned for the choice made," etc. I therefore come to the conclusion that the above question, as raised by the demurrer, must be answered in the affirmative.

Counsel for relator also raise certain constitutional questions to the right of the respondent to the said office, which may be resolved into the following proposition:

Is the provision of the act in question, making it the duty of the governor to appoint the commissioners of fire and police for metropolitan cities, repugnant to the constitution?

On this point, counsel in the brief say: "It is contrary to the general policy of the constitution, with regard to municipal corporations; a constitution that has so guarded their interests that it has inhibited the legislature from authorizing the construction of a street railway upon their streets without the consent of the corporation." This citation from the constitution, taken together with the fact that they make no other therefrom, would indicate, even had they not so stated at the bar, that this point is predicated upon the spirit of the constitution, and not upon the letter of any specific provision.

It is, no doubt, the general spirit of our constitution and institutions, and in accord with the habits and traditions of our people, that the inhabitants of every subdivision of the

state shall have an equal share and responsibility in public affairs, so far as the same shall have been found conducive to the public safety, the preservation of the public peace, and the conservation of the public morals, and in every case of doubt in construing a statute, where such construction might turn upon the recognition and fostering of such spirit, no court would be blind to its duty in that behalf. And yet it is the boast of the American people in every state that they live under a written constitution and do not look for a guaranty of their rights or liberty to any intangible code of traditions, or the opinions or constructions of any man or set of men.

Municipal corporations, in the sense of cities are several times mentioned in the constitution. An article, the XII., is devoted to them, but only to prohibit them from becoming subscribers to or owners of stock in any railroad or private corporation. Again, by section 6 of Article IX., the legislature is limited in its power to vest them with the power to make local improvements, etc., and in the section cited by counsel they are guaranteed the right to vote upon the subject of street railways running through their respective streets. But in none of these provisions, nor in any other which the limited time at my command has enabled me to find, is there any indication of the mind of the framers of the constitution or the people who ratified it to guarantee to the voters of cities of any class the right to a voice in choosing their municipal officers.

Section 7 of Article XIII. of the constitution provides for the time of holding the general election for each year, except the one at which said constitution was to be submitted for ratification, and that at such election all state, district, county, precinct, and township officers by the constitution or laws made elective by the people, except school district officers, and municipal officers in cities, villages, and towns, "shall be elected at a general election to be held as aforesaid." This provision recognizes the fact that

all municipal officers which were elective were made so by the legislature, and in my view is to some extent a recognition by the framers of the constitution of the plenary power of the legislature over the subject.

But, to return to the subject of the general spirit of the constitution and of our institutions, I have above stated that it was the general spirit of our constitution and institutions, and in accord with the habits and traditions of our people, that the inhabitants of every subdivision of the state should have an equal share and responsibility in public affairs, so far as the same shall have been found conducive to the public safety, the preservation of the public peace, and the conservation of the public morals. It is, doubtless, the duty of the courts in all proper cases to give full weight and due consideration to the above sources of construction ; but courts cannot take judicial notice of the condition of the public safety or the public morals in any class of cities or other locality of the state. These are political matters, for the consideration of the legislative and executive departments. The state is the unit of political power, and is responsible through its legislature and executive for the preservation of the peace, morals, education, and general welfare of the people, and in the discharge of the duties necessary for these purposes they are limited only by the supreme constitution of the government, the laws passed pursuant thereto, and our own constitution and laws.

I therefore reach the conclusion that the provision of the said act making it the duty of the governor to appoint a board of fire and police commissioners for cities of the metropolitan class is not repugnant to the constitution. The application is therefore denied, and the cause dismissed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

THE STATE, EX REL. EDWARD W. SIMERAL, v. L. M. BENNETT, C. HARTMAN, HOWARD B. SMITH, AND G. I. GILBERT, DEFENDANTS.

BY THE COURT.

The questions presented in this case are identical with those involved in the case of *The State, ex rel. Edward W. Simeral, County Attorney of Douglas County, v. Webber S. Seavey, respondent*, disposed of at the present term, *ante* p. 454, and its decision will follow that case.

The application is therefore denied, and the cause dismissed.

JUDGMENT ACCORDINGLY.

JAMES B. EBY, M. A. EBY, LOUIS R. EBY, JOSEPH M. BRANNAN, CORNELIUS D. RYAN, HORATIO R. TAYLOR, THOMAS BARNETT, D. T. HEDGES, AND D. T. HEDGES, SURVIVING PARTNER OF C. E. AND D. T. HEDGES, PLAINTIFFS IN ERROR, v. JOHN RYAN, DEFENDANT IN ERROR.

1. **Mortgage:** EXTENSION OF TIME FOR PAYMENT: FORECLOSURE: PLEADING. E. executed to R. a real estate mortgage to secure the payment of a promissory note at maturity. Subsequent thereto, upon a sufficient consideration, R. extended the time of payment to five years from the time of the maturity of the note. Prior to the expiration of the extended term R. brought suit for the foreclosure of the mortgage, but in his petition made no reference to the agreement for extension, nor alleged any default thereunder. T. and C. D. R., subsequent purchasers, who were made defendants, answered, setting up the extension and their purchase on the faith thereof. R. demurred to these answers as not containing facts sufficient to constitute a defense. *Held*, That the averments of the answers were sufficient to constitute a defense.

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2. ———: ———: CONSIDERATION. A new agreement, upon a sufficient consideration, extending the time of the payment of a note and mortgage to a day certain, has the effect, in equity, of modifying the original condition of the mortgage to the same extent as if the terms of the new agreement were incorporated into the condition, and where it is claimed that a default has occurred after the extension by which the mortgagor would be entitled to a foreclosure, such default should be alleged in the petition in order to state a cause of action.

ERROR to the district court for Dakota county. Tried below before CRAWFORD, J.

Mell C. Jay and *W. E. Gantt*, for plaintiffs in error, cited: *Burt v. Saxton*, 1 Hun., 551. 2 Jones on Mortgages, Secs. 1189–1191. Hilliard, Secs. 449, 585. *Union Central Life Ins. Co. v. Bonnell*, 35 Ohio State, 365. Maxwell's Pl. and Pr., 310, 311. 1 Bate's Pleading, 577. *Scheibe v. Kennedy*, 25 N. W. R., 646.

Joy, Wright & Hudson, for defendant in error, cited: 1 Nash Pl. & Pr., 344. 2 Estee Pl. & Pr., 250. Maxwell's Pl. & Pr., 250. *Pope v. Hooper*, 6 Neb., 180. *Mundy v. Whittemore*, 15 Id., 650. Miller's Pl. & Pr., 173. *Insurance Co. v. Bonnell*, 35 Ohio State, 365.

REESE, J.

This action was commenced in the district court by defendant in error for the foreclosure of a real estate mortgage given by James B., M. A., and Lewis R. Eby to secure the payment of their joint promissory note for the sum of \$2,000. The note was executed on the 18th day of November, 1881, due five years after its date, with interest at ten per cent per annum, payable annually. The mortgage is in the usual form, and contains a provision that if the interest "is not paid when the same is due, then, and in that case, the whole of said sum and interest

shall, and by this indenture does, immediately become due and payable."

The action was instituted on the 24th day of January, 1887. It is alleged in the petition that no part of the note has been paid, except the interest thereon, up to the 18th of November, 1884. A decree is prayed for the amount due upon the note. The other defendants are made parties to the suit as having acquired an interest in the property subsequent to the execution of the mortgage, and a foreclosure of such interests is also demanded.

Defendant Horatio R. Taylor filed his separate answer, admitting the execution and delivery of said note and mortgage, and that nothing but interest to Nov. 18, 1884, had been paid on said note, and, further answering, alleges, "That on or about the second day of November, 1885, James B. Eby and Louis R. Eby, defendants herein, and Horatio R. Taylor, this defendant, entered into an agreement in writing concerning the sale of the milling property described in the plaintiff's petition.

"That said agreement was filed in the office of the clerk of Dakota county, Nebraska, and recorded in book 'A,' page 302 of and a copy of said agreement, marked exhibit 'A,' is hereunto attached and made a part of this answer.

"By the conditions of said agreement the above named James B. Eby and Louis R. Eby, for and in consideration of certain things hereinafter mentioned to be performed by this defendant, agreed to assume as their own debt the mortgage now held by John Ryan against the milling property aforesaid, and if they can not pay the mortgage off and have the same canceled on the records they agree to get an extension of the mortgage for five years.

"That in pursuance of said agreement the said James B. Eby and Louis R. Eby procured and obtained from John Ryan, plaintiff herein, an extension, in the words and figures following, to-wit:

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"I agree to extend the time on a mortgage and note I hold against the Eby Bros.' mill property for three years from the time it is due, providing certain improvements are made that are now on record on the county records between Eby Bros. and Horatio R. Taylor are done on said mill property.

"JOHN RYAN.

"That this defendant has performed the conditions on his part to be performed, as required by said article of agreement, to-wit, to put in the mill on said property above described three double sets of rolls, and the machinery necessary in addition to put the mill in condition such that it will make and manufacture a good grade of flour; and that the said H. R. Taylor shall place the mill in a condition that it will manufacture a good grade of flour, within six months from the date of this contract.

"That in pursuance of the said article of agreement the deed held in escrow (according to contract between Eby Bros. and H. R. Taylor) was delivered to this defendant and filed for record on the 19th day of April, 1886, and record in deed book 'O,' page 285.

"That after the conveyance of the undivided one-half interest in the mill property aforesaid by a deed of general warranty from James B. Eby, M. A. Eby, and Louis R. Eby to Horatio R. Taylor, this defendant, the defendants, James B. Eby, M. A. Eby, and Louis R. Eby, conveyed to Joseph M. Brannan and Cornelius D. Ryan all their right, title, and interest in and to the above described property by a deed of general warranty, bearing date Sept. 10, 1886, and recorded in the office of the clerk of Dakota county, in book 'O,' page 412."

And on February 28, 1887, Cornelius D. Ryan filed his separate answer, setting up the same defense, and, also, alleging that he and Joseph Brannan purchased by warranty deed all the right of said James B. Eby, M. A. Eby, and Louis R. Eby to the said real estate, and that

their purchase was made in good faith and on the strength of the agreement of plaintiff to extend the time of the payment of said note and mortgage.

The answers of defendants Hedges relate to a mistake in the description of the property in the mortgage, and have no further connection with this case.

May 9, 1887, plaintiff filed a general demurrer to the answers of H. R. Taylor and C. D. Ryan, which the court sustained, and on proofs adduced rendered a decree of foreclosure for the sum of \$2,520.88.

The defendants bring this case to this court by proceedings in error, and allege that the court erred :

1st. In sustaining the demurrer to the answers of C. D. Ryan and Horatio R. Taylor ;

2d. The court erred in its findings in said cause, for the reason that no facts are set forth in said petition on which to base the same ; and

3d. The court erred in rendering judgment for plaintiff and against defendants.

The petition filed by defendant in error was in the usual form for declaring upon a matured note and mortgage. No reference is made to the agreement to extend the time of payment, and hence no reference to a failure on the part of plaintiffs in error to comply with the terms of the contract by which the time of payment was extended. The answers presented this issue.

By them the contract of extension is pleaded, their reliance thereon at the time of their purchase, and that by the terms thereof the note has not matured. These allegations are admitted by the demurrer. The question then is, do they present a defense to the case presented by the petition of defendant in error ?

It is not contended, nor could it be, that there was not sufficient consideration to sustain the agreement to extend the time of the maturity of the note and mortgage. The time of payment being extended, the right to foreclose

is suspended until the expiration of the extended term, unless default be thereafter made. The extension of the time of payment has the effect in equity of modifying the original condition of the mortgage to the same extent as if the terms of the new agreement were incorporated into the condition. *Insurance Company v. Bonnell*, 35 O. S., 365. It follows that if defendant in error had the right to foreclose the mortgage, it existed by virtue of some default occurring subsequent to the agreement for extension. This being true, the default should have been alleged in the petition. 2 Jones on Mortgages, section 1452. But this was not done. The answers set up the fact of the extension of time, and this was admitted by the demurrer. Therefore, on the face of the pleadings there was no default, and hence no cause of action. The demurrer should, therefore, have been overruled.

The judgment of the district court is reversed, the demurrer overruled, and the cause remanded, with leave to defendant in error, in case the interest is not paid, to file an amended petition, upon payment of all costs.

REVERSED AND REMANDED.

THE other judges concur.

THE OMAHA, NIOBRARA & BLACK HILLS RAILROAD
COMPANY, PLAINTIFF IN ERROR, v. JAMES O'DON-
NELL, DEFENDANT IN ERROR.

1. **New Trial: VERDICT SET ASIDE: NEW VERDICT.** Where a cause is tried to a jury and their verdict is set aside and a new trial granted, and the second trial results in substantially the same verdict, upon which a judgment is rendered by the trial court, and for the reversal of which proceedings in error are prosecuted in the supreme court, a petition in error being also filed by defendant in error, by which he seeks to have judgment rendered on the first verdict, the action of the district court will

23	475
24	763
25	475
26	702
27	475
28	126
29	475
30	345
31	475
32	861
33	475
34	615
35	741

not be disturbed, it being apparent that the last verdict was sufficient to cover the damage proven on either trial.

2. **Railroads: NEGLIGENCE IN NOT GIVING SIGNALS.** The failure of servants of a railroad company to give the statutory signals at a crossing when running at a high rate of speed and not upon the regular time for the train, are to be considered in deciding whether such company was guilty of negligence, and whether a person injured at the crossing used due care in attempting to cross.
3. ———: **NEGLIGENCE IN CROSSING: QUESTION FOR JURY.** The question as to whether a person injured by a passing train at a railroad crossing was guilty of negligence in attempting to cross is usually a question of fact to be decided upon all the circumstances of the case as shown by the evidence.
4. **Instructions.** Where no objections were made to the instructions in the motion for a new trial, they cannot be considered by the supreme court. *Schreckengast v. Ealy*, 16 Neb., 510.

ERROR to the district court for Platte county. Tried below before POST, J.

A. J. Poppleton, J. S. Shropshire, and W. R. Kelly, for plaintiff in error, cited: 1 *Redfield Railways*, 548. *Shearman & Redfield Negligence*, 578. *Stevens v. R. R. Co.*, 18 N. Y., 422. *Cont. Imp. Co. v. Stead*, 95 U. S., 165. *R. R. Co. v. Houston*, Id., 697. *Pence v. R. R. Co.*, 19 N. W. R., 785. *Chase v. R. R. Co.*, 5 Atlantic Rep., 771. *Williams v. R. R. Co.*, 24 N. W. R., 422.

McAllister Brothers and Sampson & Millett, for defendant in error, cited: *Railroad Company v. Stout*, 17 Wall., 657. *A. & N. R. R. Co. v. Bailey*, 11 Neb., 332. *City of Lincoln v. Gillilan*, 18 Id., 115. *Hutchinson v. R. R.*, 21 N. W. R., 212. *Greany v. R. R. Co.*, 5 N. E. R., 425. *Ernst v. R. R. Co.*, 35 N. Y., 9.

REESE, J.

This action was instituted in the district court of Platte county, for damages sustained by plaintiff resulting from

personal injury and the destruction of his team, harness, and wagon, at a railroad crossing at the town of St. Edwards, on the line of the railroad of plaintiff in error. The cause was tried to a jury, who returned a verdict in favor of defendant in error for \$5,500. This verdict was set aside by the district court, and a new trial granted. On the second trial a verdict was returned in favor of defendant in error for \$5,000. A motion for a new trial was filed, assigning two grounds therefor: First, "The verdict is not sustained by the evidence, and is contrary to law." Second, "For errors of law occurring at the trial, and duly excepted to by defendant."

This motion was overruled, and judgment rendered on the verdict. Plaintiff in error brings the cause into this court by proceedings in error. Defendant in error alleges error in the action of the district court in setting aside the first verdict, and asks that that order be set aside and judgment rendered thereon. It is conceded that the first verdict was set aside for the sole reason that the evidence was not sufficient to sustain it, and that the evidence upon that trial was substantially the same as on the last. We do not think it necessary to enter into a discussion of the testimony adduced upon the first trial, for the reason that the result of the second one was substantially the same, and for the further reason that it could not be said that there was an abuse of discretion in the action of the court. To this may be added the further reason that it is apparent that the last verdict was sufficiently large to cover the damage proven on either trial.

The sole question presented by this record is as to whether the verdict is sustained by the evidence.

The testimony upon the trial shows substantially the following uncontroverted facts: Plaintiff's railroad is constructed through the village of St. Edwards upon a straight line and a level surface. Defendant resides about one-half mile north of the village, and on the east side of the rail-

road track, the direction of which is from south-east to north-west, and perhaps about one-half mile from the track. That part of the village in which the post-office, stores, etc., are situated, is on the west side of the track, or across the same from the residence of defendant in error. The crossing is at the section line on the north boundary of the village, and about one-half mile south-west from defendant's house. On the day on which the accident occurred, defendant in error was in the village with his team and wagon, and at about seven o'clock in the evening started to go home. The point from which he started was about four blocks north-west of the depot, and perhaps about the distance of one block from the track of plaintiff's road. His first direction was one and a half blocks west, thence four blocks north, which again brought him near the track, parallel with the track to the north-west along the right of way for about one hundred and eighty yards to the section line crossing, where, by a short turn to the right, he sought to cross the railroad track. As he was in the act of crossing the track, plaintiff's train, coming from the south-east, struck his team and wagon, killing both horses, breaking the wagon and harness, and injuring him. The regular time for the train was 5:30 o'clock. It was therefore about one and a half hours late. Of this fact defendant in error had knowledge, for he had seen the train standing at the depot, about three-quarters of a mile south-east from the place of the accident, some little time before he started home, but he testifies that he had been informed by what he considered reliable authority that the train had gone before he started. His informant, however, was in no way connected with the railroad. It was quite cold, and the wind was blowing strongly from the north-west. There was but the one train per day running each way, the return train going south in the morning.

In the examination of the question presented—the contributory negligence of defendant in error—it must not be

forgotten that all questions of fact were for the jury to determine, and that where the testimony was conflicting, it was for them to decide as to which of the witnesses were entitled to belief. In addition to the foregoing statement of facts, there was sufficient evidence to support the finding that the train was running at an unusually high rate of speed, and that no signals were given of its approach to the crossing. That when defendant in error approached the track before turning parallel with it, he looked along the track and saw no train, and that he again looked when about half way from there to the crossing, with the same results. That the road upon which he was driving was very rough and frozen hard, so that he could not or did not hear the approach of the train as it came up in his rear, no other noise being made by it than the exhaust of steam, and that caused by the running of the train—neither bell nor whistle being used—and that he had no knowledge of its presence until he was on the track and saw it not more than fifty feet away, bearing down upon him at what some of the witnesses testified to be double its usual rate of speed. There is no question as to the fact of the accident. One of the horses was thrown upon the right, the other to the left side of the engine. The wagon was thrown from the track with great force, and the sound of the collision was heard a half mile away; yet the engineer testified that he neither saw nor heard anything of the accident and knew nothing of it until the next day.

If it be true that the train was running at the rate of speed described by the witnesses through the village, and that no signal of any kind was given—the train being one hour and a half later than its usual and regular time—these facts would be proper to be considered by the jury in ascertaining whether the employes of plaintiff in error were negligent or not, the law requiring the signals to be given. Comp. Stats., 1885, 203, Sec. 104. Upon the other hand, if the jury found that defendant in error had

sufficient reason to believe the train had gone, that when he approached the railroad track he looked down the track and saw no train, and that this was repeated before trying to cross, with the same result, and that under all the circumstances he exercised that degree of care usually exercised by and required of reasonably prudent men, they would be justified in finding that he was guilty of no such negligence as would defeat his recovery. These questions of negligence were for the jury to decide, and we cannot conceive how, as matter of law, it can be said either that plaintiff in error was not, nor that defendant in error was, negligent. The first duty was upon plaintiff in error, a part of this was the compliance with a plain mandatory statute. Defendant in error had the right to expect this duty to be observed in case a train should pass at that time. Not that a failure to perform it would exonerate any fault of his, nor release him from the exercise of proper care, but that he might have the opportunity of knowing of the approach of the train. It is true that plaintiff in error had the right to expect due care of any one who might be near its track with a design to cross, but that would not justify it in running at the reckless rate of speed described by the witnesses, against a high wind, and in violation of law. The degree of care required of a person who is about to cross a railroad track is such care as could be reasonably expected of an ordinarily prudent person under like circumstances, and this was a question for the jury to determine under all the circumstances of the case. This case seems to us to be peculiarly within the rule stated by the supreme court of the United States in *Railroad Co. v. Stout*, 17 Wall., 657, and approved in *Railroad Co. v. Bailey*, 11 Neb., 332, and in *The City of Lincoln v. Gillilan*, 18 Id., 115. See also, upon this part of the case, *Ry. Co. v. Hutchinson*, 11 N. E. Rep., 855. *Railroad Co. v. Rudel*, 100 Ill., 603. *Railroad Co. v. Troutman*, 6 Am. and Eng. Ry. Cases, 117.

Smedis v. Ry. Co., 88 N. Y., 13. *Ry. Co. v. McLin*, 82 Ind., 435-452. *Sherry v. Ry. Co.*, 10 N. E. Rep. (N. Y.), 128. The verdict cannot, therefore, be molested, as not being sustained by the evidence.

Objection is made to instruction number ten, given to the jury by the trial court, but as the question of its correctness was not presented to that court in the motion for a new trial, it cannot be considered here. *Schreckengast v. Ealy*, 16 Neb., 510. *Railroad Co. v. Walker*, 17 Id., 432.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

STATE OF NEBRASKA, PLAINTIFF IN ERROR, V. JAMES SNEFF, DEFENDANT IN ERROR.

1. **Criminal Law: BURGLARY.** Where the proprietor of a building hears of an intended burglary to be committed by breaking into such building, and does not prevent it, but puts a force in the building to capture the burglar, and does effect his capture, this does not affect the guilt of the burglar.
2. —: **EVIDENCE OF ACCOMPLICE.** A person to whom one intending to commit burglary confides such intention, and procures such person to promise to act as accomplice, is a competent witness to prove the declarations and acts of the party committing the offense, the credibility of such witness being a question for the jury.
3. —: **DIRECTING VERDICT.** Where there is testimony from which the jury would be warranted in finding that a person indicted for burglary committed the offense, it is error for the court to direct the jury to acquit.

EXCEPTIONS filed by county attorney of Richardson county (BROADY, J., presiding), under the provision of sections 515 *et seq.*, of the criminal code.

E. W. Thomas and *Edwin Falloon* (county attorney), for the state.

No appearance contra.

MAXWELL, CH. J.

The defendant was indicted by the grand jury of Richardson county for the crime of burglary, by breaking into the B. & M. railroad station at Humboldt. On the trial of the cause the court instructed the jury as follows :

"Gentlemen of the jury—You are directed to return a verdict of acquittal in this cause, for the reason that the evidence is too clear that this man Bayliss was under the direction of the railroad company's agent, when he was pretending to be in collusion with this defendant, and going with him to commit this crime. He was under their direction to further the perpetration of the act, and present giving encouragement at the time it was done, which in law, I think, shows a consent on the part of the owner of the property. And there is not enough evidence to the contrary to submit the question of fact to the jury. The law being, if the owner of the property consent, it is not a crime for which he can put a party in the penitentiary. To make it a crime, the act must be without the consent of the owner.

"Such methods are very useful, and generally used for ferreting out past offenses, but cannot be used in this way. They may be used for the purpose of aiding in investigating and ascertaining the perpetrator of past offenses, but are not useful for the purpose of making new offenses, or the punishment of new offenses, for the policy of the law is to

stop crime, and not to permit one to commit a crime when he otherwise would not do it."

The district attorney excepted to the instruction. The jury rendered a verdict of acquittal, and the defendant was discharged.

The prosecuting attorney, for the purpose of settling the law, brings the cause into this court on error.

One James Bayliss, called as a witness by the state, testified :

Q. Do you know the defendant, James Sneff?

A. I saw him once or twice, I believe.

Q. How long have you known him?

A. Well, since last fall; I cannot just state the time.

Q. Ever since last fall?

A. Since he came to Humboldt, I don't just exactly know the month and day.

Q. Were you in company with Sneff on the night of the 13th of November, 1886, in Humboldt, Nebraska?

A. I cannot say about the date, but it was about that time.

Q. What proposition did he make to you?

A. He made a proposal that he would get into the depot and get some money, if I would watch for him.

Q. About what time was that?

A. I could not swear to the day, I paid no attention to it.

Q. Can you state the month?

A. No, sir; I cannot tell.

Q. Was it in 1886?

A. Yes.

Q. Was it in the fall?

A. It was.

Q. Was it in October or November?

A. I could not say for certain.

Q. What proposition did he make to you? Tell all about it, and what he did.

A. Well, the first time I ever spoke to the man, he walked up to me as I was standing on that corner of the depot, and he asked to borrow two dollars of me, and told me he could make two hundred out of it between that time and to-morrow; I says, I have no money to loan, but if you are busted, and want work, I will tell you where you can get it. I told him he could get work of Feayle, out in the country, shucking corn; he said he would not work; he turned around and went into the depot, and I came back and walked along, and he was fumbling with the money box; that was between 12 and 1 o'clock, day-time.

Q. What other proposition did he make to you?

A. He made the proposal, if I would watch, he would get some money out of the money drawer in the station house at Humboldt.

Q. In this county and state?

A. Yes.

Q. What did you say to him?

A. I told him I was not in that kind of business.

Q. Who did you communicate this information to?

A. As soon as he and I went up town, I came back and told Aiken, the station agent at Humboldt.

Q. Then what did you do?

A. I went back up town, Aiken told me to aid and watch him, and if he wanted to do it to watch, and they would catch him in the act; and that between five and six, when the freight trains come down, he was to break in and I was out on the road watching for him, and he and some more men were in the station house watching for him, too. He said they didn't leave the waiting room door open as they had done and he would not break in. So he came back, and we went up town, he went to town and I went home.

Q. What time was that?

A. Between six and seven o'clock in the evening,

State v. Sneff.

and I went over to a house in sight of the depot, and Cooper and some more men came over, and I says to them, I says, Cooper, I am going to let that fellow go; no, Cooper says, you go up town, and, if he comes around you again, let him go ahead. I went up town, and he came to me in a few minutes and spoke to me again, saying that he knew the agents were both gone.

Q. What did you do then?

A. I stayed around with him until some time the fore-part of the night, and we went to the depot together and he broke in.

Q. Did he raise the window, or did you?

A. He did; I didn't have my hands on the window.

Q. How was it fastened?

A. With a nail on the inside of the window.

Q. How did he raise it?

A. He raised it with a railroad spike.

Q. Then what did he do?

A. He went into the office.

Q. How was the window fastened with a nail?

A. I cannot say positively how it was fastened, but the window was nailed down and the nail was broken and laying on the outside.

Q. Where was it driven on the inside?

A. I don't know where it was driven, it looked as if it was driven into where the catch was.

Q. It fastened the lower sash down, did it?

A. Yes.

Q. Tell what Sneff did then?

A. He went in, and when he went in I went back to the corner, and then they came up on him, and he jumped out of the window and they took him.

Q. Did you make an examination of the station house after they caught Sneff?

A. Not until the next morning.

Q. Did you make an examination of everything he did in there?

A. I didn't see anything he did except where he tried to open one drawer. I don't know what was in it—a drawer where they kept something.

Q. Where was that?

A. In the station room.

Q. Whereabouts in the station room?

A. About the second box, I think, from the ticket window.

Q. A money drawer, was it?

A. I don't know what they kept in it.

Q. Was there any marks upon it?

A. Yes, there were marks of a spike, where he tried to pry it open.

Q. Did you ever talk to Sneff after the action was committed?

A. Yes.

Q. What did he tell you?

A. He said he believed it was a put-up job.

Q. What did he say he went in for?

A. For money, that was his purpose.

Q. What did he say afterwards?

A. He didn't say anything about it afterwards much.

Q. What time of night was this?

A. I think between 11 and 12, the forepart of the night.

The other testimony in the case tends to corroborate this, and there is no testimony to the contrary. So far as appears, there was no consent on the part of any one having charge of the station to the defendant breaking into the same. The fact that those in charge of a building hear of an intended burglary to be committed by breaking into the building, do not prevent it, but put a force in the building to capture the burglar, and he is so captured, does not affect the guilt of such burglar. *Thompson v. State*, 18 Ind., 386.

Whatever may be thought of the course of the witness Bayliss, in professing to be a friend of the accused while

conspiring to betray him, and however despicable his conduct may appear, these matters merely affect his credibility before the jury. He is a competent witness to testify as to any matter that transpired between the accused and himself, provided such matter is competent. But the degree of reliance to be placed upon his testimony is a question for the jury.

In *State v. Jansen*, 22 Kan., 498, which is similar in some respects to the one under consideration, where an alleged detective assisted the accused to commit the offense, it was held that the question whether the proprietor consented to the entry of the defendant was for the jury to determine from the testimony in the case.

In our view the court should have submitted to the jury the question whether or not the railroad company consented to the defendant's entering the building in question, and erred in directing the jury to acquit the accused.

JUDGMENT ACCORDINGLY.

THE other judges concur.

22	487
29	190
22	487
35	881
22	487
40	717
41	831

CHARLES O. SMITH, PLAINTIFF IN ERROR, V. SARAH J.
BORDEN, DEFENDANT IN ERROR.

1. **Justice of Peace: APPEARANCE.** A party who has appeared in an action before a justice of the peace and entered into an agreement continuing the cause, may appeal from the judgment rendered against him before such justice. *Cleghorn v. Waterman*, 16 Neb., 230. *Crippen v. Church*, 17 Neb., 306.
2. ———: **APPEAL.** Under Sec. 1008 of the code as it existed in 1885 a party appealing from the judgment of a justice of the peace had until the second day of the succeeding term of the district court in which to file the transcript, and the plaintiff had twenty days thereafter in which to file his petition. Therefore, where

Smith v. Borden.

an appeal had been properly taken by a defendant, a motion made by him on the first day of such term to dismiss the cause for want of prosecution was premature, and should have been overruled.

ERROR to the district court for Harlan county. Tried below before GASLIN, J.

John Dawson, for plaintiff in error.

F. B. Beall and *J. E. Bush*, for defendant in error.

MAXWELL, CH. J.

In April, 1885, the plaintiff filed his bill of particulars before one Henry Wilcox, a justice of the peace for Harlan county, claiming from defendant the sum of \$12.90, with interest from October 13, 1884, for goods sold and delivered to said defendant by David Brothers & Co., which account was assigned to plaintiff. The cause coming on for trial on the 27th day of April, the parties appeared by their respective attorneys, and the case was continued by consent to the 27th day of May. On that day, defendant failing to appear and plaintiff appearing by his attorney, judgment by default was taken against defendant in the sum of \$13.25 and costs taxed at \$4.70. The defendant then took the case to the district court of said county on appeal. Plaintiff thereupon filed a motion in said court to quash the appeal, for the reason that the defendant did not appear at the trial of the cause in the court below. The motion was overruled, to which plaintiff excepted, and on the first day of the next term the defendant filed a motion in said court to dismiss the action for want of prosecution. The motion was sustained, and judgment rendered against the plaintiff for costs, to all of which the plaintiff excepted, and now brings the cause into this court by petition in error.

The motion to quash the appeal was properly overruled.

Smith v. Borden.

In *Clendenning v. Crawford*, 7 Neb., 474, it was held that to entitle a party to appeal, he must have appeared before the justice and tried the cause upon the merits. This decision was followed in a number of cases. The opinion in the case cited was written by Judge Gantt and concurred in by the entire court. In *Cleghorn v. Waterman*, 16 Neb., 230, and *Crippen v. Church*, 17 Neb., 306, however, it was held by a majority of the court that a party who had appeared on the trial might appeal although he had not tried the case on the merits. These later decisions practically overrule that of *Clendenning v. Crawford*, and are to be followed. The court did not err, therefore, in overruling the motion to quash the appeal.

The court erred in sustaining the motion to dismiss the action. Sec. 1008 of the code of 1885 provided that, "The said justice shall make out a certified transcript of his proceedings, including the undertaking taken for such appeal, and shall, on demand, deliver the same to the appellant, or his agent, who shall deliver the same to the clerk of the court to which such appeal may be taken, within thirty days next following the rendition of such judgment; and such justice shall also deliver or transmit the bill or bills of particulars, the depositions, and all other original papers, if any, used on the trial before him, to such clerk, on or before the second day of such term; and all other proceedings before the justice of the peace in that case shall cease and be stayed from the time of entering into such undertaking."

Under this statute the appellant had until the second day of the succeeding term to file his transcript. *Roesink v. Barnett*, 8 Neb., 149. *Monell & Lashley v. Terwilliger*, 8 Neb., 363. *Rich v. Stretch*, 4 Neb., 188. And the plaintiff had twenty days thereafter in which to file a petition.

The plaintiff not being in default, the court erred in sustaining the motion to dismiss.

The judgment of the district court is therefore reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

HORACE M. WOOLMAN, PLAINTIFF IN ERROR, V. MILTON H. WIRTSBAUGH, DEFENDANT IN ERROR.

1. **False Representations: DAMAGES: INSTRUCTIONS.** In an action by a purchaser against a seller for falsely representing that the boundaries of land offered for sale included certain level land pointed out by the seller, it is the duty of the court to instruct the jury as to what constitutes the particular damages claimed in that case, and a general instruction, that if the jury find the plaintiff has sustained damages they may find a verdict in his favor, is calculated to mislead.
2. ———: **MEASURE OF DAMAGES.** Where real estate is purchased on the personal representations of the seller, and such representations are false as to the location of the property, the measure of damages is the difference in value between the property as represented, and as it actually is.

ERROR to the district court for York county. Tried below before NORVAL, J.

France & Harlan, for plaintiff in error, cited : *Jackson v. Timmerman*, 7 Wend., 436. *Seward v. Jackson*, 8 Cow., 406. *Hilliard New Trials*, Sec. 127. *Williams v. Hartshorn*. 30 Ala., 211. 3 *Sutherland Damages*, 578.

J. F. Hale and *Scott & Gilbert*, for defendant in error, cited : 3 *Sutherland Damages*, 592. *Drew v. Beall*, 62 Ill., 165.

MAXWELL, CH. J.

The defendant in error brought this action in the court below to recover of the plaintiff the sum of \$500 damages, which, he alleged, he sustained by reason of false representations made in the sale of eighty acres of land in York county. The plaintiff was agent for one Elam G. Fay, who was the owner of the land so sold and conveyed to defendant, the sale being made in November, 1883. It is alleged in the petition that plaintiff in error represented that said eighty acre tract contained a strip of land, which, in reality, is situated on the west side of said land, and which strip of land contained twenty-four acres, and is a smooth and level piece of land, worth at least \$500, and damages in that sum are claimed. The answer is a general denial. On the trial of the cause a verdict was returned in favor of Wirtsbaugh for the sum of \$200, upon which judgment was rendered.

The testimony of Wirtsbaugh tends to show that Woolman pointed out the boundaries of the land in question to him, and that the western line so pointed out included 20 to 24 acres of smooth land, which was afterwards found not to be included in said 80 acre tract; while the testimony of Woolman is that he did not know the exact boundaries of the land, and so informed Wirtsbaugh, and that he pointed out what he supposed to be approximately the western boundary; that they had found the north-east corner of the land, and drove, as they supposed, to about the west line of the land, without knowing definitely where it was located, and that he so informed Wirtsbaugh.

The court instructed the jury that, "If you find from the evidence that the defendant Woolman at or prior to the time of the sale of the land in question told the plaintiff Wirtsbaugh he knew where the boundaries of said land were, and then represented to the plaintiff where the western boundary line of said land was, and that said repre-

sentation was false, and that the plaintiff then relied upon said representations, and was induced thereby to make the purchase of said land, and has sustained damages by means thereof, then you should find for the plaintiff."

This instruction is entirely too general in its statements, and left the jury without any guide as to the character of the alleged damages—if they found such to exist, for which they might award damages. *Wasson v. Palmer*, 13 Neb., 378. *Ballard v. State*, 19 Id., 619. The court, therefore, erred in giving the instruction.

The court also gave the following instruction: "If you find for the plaintiff, the measure of damages would be the difference, if any, between actual market value of the 80 acres of land conveyed at the time of the sale and the actual market value at that time and place of a like quantity (80 acres) of the average quality of the 104½ acres."

This instruction is clearly erroneous and calculated to mislead the jury, as it left them at liberty to make the comparison of values upon an entirely different tract of land. In no event could the measure of damages exceed the difference in the value of the land as alleged to have been represented and as it actually is.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

Wolgamood v. Randolph.

A contract is attached to said note that is not involved in this case and need not be set out. Wolgamood filed a motion before the justice to dismiss the action: 1st, because no legal service of summons had been made on him; 2d, that no legal summons had issued in said cause; which motion the justice sustained, and dismissed the action at the cost of plaintiff below. The case was taken on error to the district court, where the judgment of the justice was reversed and the case retained for trial. After the reversal of the judgment, and while the cause was pending for trial in the district court, a motion was filed to substitute Ella Randolph in place of H. & A. F. Randolph as plaintiff. An order of substitution was made by consent of parties, and on the trial of the cause a verdict was returned in favor of Ella Randolph for the sum of one hundred ninety-eight and $\frac{56}{100}$ dollars, upon which judgment was rendered.

The only defense to the action was, that H. & A. F. Randolph having brought the action as partners the testimony failed to establish the partnership. It is sufficient to say that there is some testimony tending to show such partnership and none whatever tending to disprove that fact. The jury, therefore, were warranted in finding, as they seem to have done, that such partnership existed.

But if there had been a failure to prove that H. & A. F. Randolph were partners, it would not be fatal to a recovery, the action being brought in their individual names. It is true that their Christian names are not given, but merely initials thereof, and while the defendant below, by motion, might have required the plaintiffs below to amend the petition by setting out their Christian names, the failure to do so will be held to be a waiver of that right.

These parties were, so far as appears, the lawful holders of the note. It had been endorsed by the payee and was thereafter transferable by delivery; and a judgment on the note in favor of such parties would protect the defendant below, upon paying the same, from further liability on

Bonns v. Carter.

the note; therefore he could not be injured by such judgment, and the transfer having been made to Ella Randolph before judgment was rendered, she is entitled to recover. No valid defense has been shown to the action, and the judgment is clearly right and it is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

SAMUEL H. BONNS, PLAINTIFF IN ERROR, v. WILLIAM
H. CARTER, DEFENDANT IN ERROR.

Assignment for Creditors. Rule laid down in *Bonns v. Carter*,
20 Neb., 566, adhered to.

This was a rehearing of case reported 20 Neb., 566. The former judgment was by a majority of the court (MAXWELL, CH. J., and COBB, J.), adhered to. REESE, J., dissented, and filed the opinion which follows, MAXWELL, CH. J., commenting thereupon, and expressing the views of the majority of the court on the law of the case. The cases cited by counsel are commented upon in the opinion of JUDGE REESE.

D. A. Holmes, for plaintiff in error.

E. F. Gray, for defendant in error.

DISSENTING OPINION OF REESE, J.

This cause was decided at the July, 1886, term of this court, and is reported in 20 Neb., 566. On an application for a rehearing being granted, the cause was reargued and submitted, a majority of the court adhering to the decision first made, but declining to write an opinion. To

22	495
24	718
22	495
26	508
27	520
22	495
41	38
41	71
22	495
44	572
22	495
o45	140

this holding I cannot agree, and will here state my reasons therefor.

The principal question involved, and which I shall notice, is, the holding that the execution of the mortgage by B. C. Hamilton to Samuel H. Bonns was, in effect, an assignment for the benefit of creditors, and, not being made in accordance with the statute governing assignments, was void.

The discussion of this question involves the correctness of the charge given to the jury by the trial court, to the effect that the mortgage was an assignment for the benefit of creditors and was void. This instruction being set out in the original opinion, need not be recopied here.

I have carefully considered the authorities cited by counsel, as well as others not cited, and am led to the conclusion that the rule stated in the former decision cannot be sustained either upon principle or authority, and should not be declared to be the law of this state.

My first consideration will be of the cases cited by JUDGE COBB in the opinion written by him, above referred to.

The case of *Wallace & Krebs v. Wainwright*, 87 Pa. St., 263, was one in which the transfer of property was made to Wallace & Krebs—who were attorneys and represented a number of creditors—in payment of the claims held by them. Some of the creditors named were not present nor represented, some afterwards assented to the arrangement, some neither assented nor refused to assent. Wainwright obtained a judgment and had an execution levied on the claims and judgments which had been assigned to Wallace & Krebs. The trial court held the transfer to them to be an assignment for creditors. This was affirmed by the supreme court, which held that the transfer created a trust. The legal title of the assigned property being in Wallace & Krebs and the equities in the creditors. I have not at hand the statute upon which this decision was made, but by the references made to it in the

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opinion as applying to the assignment of property made by debtors "to trustees on account of inability at the time to pay their debts," I think it sufficiently appears that the decision is based wholly upon the language of the statute of Pennsylvania, and can have no bearing upon this case. It is pretty clear that the statute of that state refers to assignments of property made by debtors to trustees, and under that language the court could very properly hold that Wallace & Krebs took the property as trustees under the statute, and it was therefore an assignment.

The case of *Hardraker v. Leiby*, 4 O. St., 602, would be strongly in favor of the position of defendant in error, were it not that the decision is based wholly upon the statute of Ohio, which is as follows: "All assignments of property in trust which shall be made by debtors to trustees in contemplation of insolvency with the design of preferring one or more creditors to the exclusion of others shall be held to inure to the benefit of all the creditors in proportion to their respective demands."

This in effect defines a legal general assignment for the benefit of creditors, and a case like the one at bar falls clearly within its provisions, and would be a general assignment, but as we shall hereafter see, no such provision can be found in the statutes of this state governing assignments of property, and therefore we fail to see how the case above named can be quoted as authority.

The case of *Page v. Smith*, 24 Wis., 368, would seem to support the theory of the defendant in error, but whether based upon the statute of that state is not clear. It follows the decision in the case of *Norton v. Kearney*, 10 Wis., 386, which was decided in 1860. In 1885 a question similar to the question involved in the case at bar was before the same court in *Carter et al. v. Rewey*, 62 Id., 552; and while the case of *Page v. Smith* is not in terms overruled, yet I am inclined to adopt the reasoning of Judge Cole in the opinion as being the last expression of that

court upon the question involved, and which to my mind is the most logical. The instrument under consideration in that case was a chattel mortgage, in the usual form, executed by Charles H. McLean, the debtor, upon a quantity of jewelry and other personal property named, upon the condition that if McLean should forthwith pay three debts specified, amounting to \$385, also to secure such other claims against him as might come in the hands of the plaintiff for collection, and a claim of Aiken, Lambert & Co. for \$127, then the sale should be void. The mortgagee took possession of the property, and had such possession when it was seized under certain orders of attachment. I quote from the opinion the following:

"There is no pretense that the debts which the chattel mortgage was given to secure were not the *bona fide* debts of the mortgagor, but it is said that McLean was justly indebted to other creditors when he gave this mortgage upon his entire stock of goods, and that the plaintiff knew the facts. But, still, it is competent for a debtor in failing circumstances to pay or secure one creditor or a number of creditors, where there is no statute forbidding such preferences, and the transaction is not tainted with an unlawful intent."

It was contended in that case that the instrument there under consideration was in effect an assignment for the benefit of creditors, and void by reason of the failure to comply with the requirements of the statute governing assignments. The mortgage was sustained and held not to be an assignment. It contained the element of trust, as in the mortgage in question in the case at bar. In view of that decision we do not think the supreme court of Wisconsin can be cited as sustaining the theory contended for by defendant in error.

Referring to the cases cited by the defendant in error, *Englebert v. Blanjet*, 2 Wharton (Penn.), 240, is relied upon. The decision was made in 1836, and is founded upon an act of the legislature of 1818. The debtor assigned and conveyed

a collection of personal property to his creditor to sell and satisfy his claims, and then pay other creditors named, the balance remaining to be returned to him. From the language of the opinion it is inferred that the act referred to makes an assignment or conveyance "for the use of his creditors" or "for the use of such persons to whom such assignment is made and other creditors" an assignment for the benefit of all creditors, and requires assignments to be recorded. This was never recorded. The next day the debtor applied to the court for the benefit of the insolvent laws, setting forth in his petition that he had conveyed all of his property in the assignment the day before, and annexed to the articles conveyed a list of his creditors. On the 3d of April, twenty days afterwards, he executed an assignment under the law. The assignees refused to act, and Engelhower was appointed by the court. Engelhower then brought suit for the property conveyed by the first transfer, and succeeded in his action. The court held the first assignment void because not recorded. Under the very general terms of the act of 1818, we cannot see how any other holding could have been had, as the first transfer was "for the use of his creditors," and was by the act made an assignment of his property.

This view is sustained by the holding of the same court in *Lockhart v. Stevenson*, 61 Pa. St., 64. This case was decided in 1869. Wooten having failed, sold by bill of sale and delivered his stock of goods to Lockhart, in consideration of certain claims held against him by Lockhart and part of his other creditors. He had previously made arrangement among those to divide the proceeds *pro rata*. The trial jury found the transaction was *bona fide*. It was claimed that the bill was an assignment for creditors, which was required to be recorded. There being no trust for creditors, the question was, Was it a sale or an assignment? It was held to be a sale, and not an assignment.

The case of *Burrows v. Lehnendorff*, 8 Iowa, 96, was decided

in 1859. The facts in that case were substantially as follows: On the 16th of January, 1857, the debtor made three chattel mortgages to secure that number of creditors, all made at about the same time, Burrows being the last of the three, taking in his order. On the 17th he made two more to other creditors, and a deed of trust to one Sylvester to secure other creditors, the whole indebtedness being \$4,922.04, the instrument covering the same goods, and the deed of trust contained in addition some real estate, the first taking precedence as to its payment, the others following in their order. It was filed January 17th, 1857, at 5:50 o'clock, the others following in their proper order of succession every five minutes. The debtor's attorney notified the plaintiff the next day. On the 28th of the same month he caused an attachment to issue. The statute of that state, at that time, was, that no general assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors of the assignor shall be valid unless made for the benefit of all creditors, in proportion to the amount of their claims. In the discussion of this statute Judge Wright, in rendering the opinion of the court, says: "*But for this provision*, any debtor might make a general or partial assignment to a trustee for the benefit of his creditors with preferences, the said assignment being valid as against the process of said creditors from the time of the execution of the deed, subject, of course, to any liens upon the property assigned." In support of this he cites a number of cases to which we need not refer. He then says the primary and controlling question is, Was this an assignment? The question of fact was submitted to the jury. The instruction of the court was, in substance, that if the instruments were executed at the same time and constituted one transaction, were made by defendant on his own motion, and he was at the time insolvent and by these instruments conveyed all his property not exempt from execution, then the conveyance would

be an assignment, and void. The jury found against the defendant in the action, and the instruction and verdict were sustained. The case seems to have been in the main sustained upon the finding of the jury that the instruments were executed at the same time and constituted one transaction, and as being in violation of the statute of the state to which we have referred.

The case of *Van Patten and Marks v. Burr et al.*, 52 Iowa, 518, was decided upon a demurrer to the petition. The petition alleged that the defendant executed a chattel mortgage for the benefit of a part of his creditors, and immediately, and on the same day, made a general assignment for the benefit of all, and that they were intended as a whole to constitute a deed and general assignment, that these instruments were prepared by the assignor's attorney at his request, both acknowledged before the same officer, and filed by the attorney for his client at 2:54 and 3:00 o'clock P.M. before delivery, and that the assignment as a whole was void because it gave a preference to one of the creditors. The demurrer to the petition was sustained by the district court, the judgment being reversed by the supreme court.

Justice Beck, in delivering the opinion of the court, says: "The transaction contemplated in the provision of the statute which is substantially quoted in the case last above cited and termed a general assignment, is a disposition of all the property of the insolvent for the benefit of all his creditors," and it did not matter how this was done, whether by one instrument or more; if all constituted one transaction as alleged, and conveyed all the property for all the creditors, it was an assignment. As it preferred those to whom the mortgage was given, it was void. The petition alleged that they as a whole were intended as one assignment. Now as a general assignment constituted a part of that transaction, it is very clear that the decision of the supreme court was right, being based alone upon the alle-

gation of the petition that both instruments were intended by the insolvent as the one act of assignment.

The case of *Lamson v. Arnold*, 19 Iowa, 479, may be considered as throwing some light upon the holding of the supreme court of that state, although not directly in point. In that case the debtor, simultaneously with an assignment, conveyed lands to one creditor in payment of a debt. Another he paid in money, and the third part in money and part by the transfer of promissory notes. The court held that the insolvent had the right, in that way, to prefer creditors.

The case is based upon the right of the insolvent to appropriate his property while he exercises over it the *jus disponendi* (the right of disposition). The statute simply limits his right to prefer creditors where he makes a general assignment. It was held that the payments and the assignment did not constitute one transaction so long as the insolvent retained the right of disposing of the property; that he might appropriate it to the payment of his debts, and might prefer creditors. He might use all of his property in this way, or he might so use part and make a general assignment of the remainder.

The distinction is drawn between the absolute appropriation of the property and conveyance by way of mortgage, if the debtor intends disposing of all his property for the benefit of his creditors. But if he mortgages a part and assigns the remainder, this constituted one transaction. The property passes to the mortgagee or assignee in trust, to be disposed of as required by law and the conditions of the instruments he executes. In that case, the mortgage and the assignment being coupled together and included in the one transaction, would become the one act of the debtor, and under the statute all the property would be included in the assignment. If, then, while the right of disposing of the property exists, the debtor, as in this state, has the right to prefer creditors, there being no attempt to make a

general assignment, it would seem that he might make such a disposition of his property to secure *bona fide* debts as he should desire.

The case of *Dickinson v. Rossen*, 5 O. St., 218, is based upon the same statute as *Hordraker v. Leiby*, *supra*, and need not be noticed.

The case of *Winner v. Hoyt*, 28 N. W. Rep., 380, was decided by the supreme court of Wisconsin during the last year. The principal facts in that case were, that six chattel mortgages were made and accounts were assigned to secure several debts. The mortgages covered substantially the same property. All were made at the same time. The mortgagees knew the mortgagor to be insolvent. The property mortgaged was all the mortgagor had, and did not cover more than sixty per cent of the debts. It was intended that the mortgagee should take immediate possession, which he did, convert all into money, and divide it among the creditors *pro rata*. Upon a garnishee process against him it was held that the several mortgages and assignments constituted one transaction, and that the garnishee acted as the trustee of the mortgagees and assignees, except as to his own claim, and that it was not, in legal effect, an assignment for the benefit of creditors, preferring those named, and void. This decision was founded upon the provision of the statute of that state, which, so far as necessary, we quote: "All voluntary assignments or transfers, whatever, of any real estate, chattels real, goods or chattels, rights, credits, moneys, or effects, for the benefit of or in trust for creditors, shall be void as against the person making the same, unless" executed as therein required, and "any and all assignments * * * made for the benefit of creditors which shall contain or give any preferences to one creditor over any other creditors, except for the wages to laborers * * * shall be void." It will be observed that this language is sweeping in its character, not only including all voluntary assignments, but all transfers whatever for the benefit of or in trust for creditors.

It would seem that the existence of such a provision would tend to forestall any question as to the effect of such transfers, yet Judge Taylor dissents from the opinion of the majority of the court, and writes a lengthy and logical opinion, holding that: 1st, a debtor may prefer a creditor; 2d, that he may prefer more than one; 3d, he may mortgage part of his property; 4th, he may mortgage it all.

The decisions in this state may be said to settle these four propositions in the affirmative. A debtor may prefer his creditor; he may prefer more than one; he may mortgage a part of his property, or he may mortgage all, if done *bona fide*. *Lininger v. Raymond*, 12 Neb., 19. *Grimes v. Farrington*, 19 Neb., 48. *Nelson v. Garey*, 15 Neb., 531. *Bierbower v. Polk*, 17 Id., 268.

We will briefly notice the authorities presented by plaintiff in error, and, in addition thereto, some to which neither party has referred.

The case of *Gage v. Chesebro* (Wis.), 5 N. W. Rep., 881, is one in which a debtor assigned personal property to his creditor, authorizing him to go into possession, sell and dispose of the same, apply the proceeds to extinguishing indebtedness due creditors, and retain the balance, to be applied upon certain notes, upon which the creditor was endorser, in case they were not paid by the assignor. This instrument was held a chattel mortgage, and not an assignment for the benefit of creditors; therefore not void because of a failure to comply with the law in regard to assignments. It is held that wherever it appears that an instrument is intended as security the debtor has the right of redemption if seasonably exercised, and that the garnishee should not, by reasons of the proceedings against him, be put in a worse position than if the different claims were enforced against him by the defendant himself. It is also held that the creditor might, though he knew his debtor was in failing circumstances, if his action was honest, and not for a fraud-

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ulent purpose, take an assignment of all his debtor's property to secure himself, and if the debt was *bona fide*, and the assignment made without fraudulent intent, it was valid.

In writing the opinion of the court, Judge Cole says: "It is true there is no defeasance in the instrument, nor was it designed there should be, to give the grantor the right to reclaim the property upon the payment of the debts and liabilities therein mentioned, for whenever it appears that the instrument is intended merely as a security the debtor has the right of redemption, if seasonably exercised. But without longer considering the question, to our minds it is plain that the instrument is nothing but a mortgage, and cannot be held void upon its face for any of the objections taken to it."

In *Peck v. Merrill*, 26 Vt., 686, Merrill became embarrassed and Page, Lowell, and Toplin became his sureties, and to secure them from liability he turned over to them all his property at East Greenfield, subject to an attachment, and also his store at South Bradford. Peck & Co. garnished Page, Lowell, and Toplin under what was known in that state as trustee process. There was no assignment law in Vermont, but there was a law absolutely prohibiting assignments, making them void as against the creditors of the debtor. Without quoting at length from the opinion, it may be said that it was held that the act of 1843 prohibited general assignments which should be so construed as to be confined to such transfers of property as were made in trust for creditors, and that the transfer by a debtor of all his property did not make of it what is termed a general assignment unless it also be conveyed to trustees to be held in trust for their creditors, and if the debtor conveys his property directly to creditors or sureties for their benefit, and no trust is created for others, the transfer must then be regarded as a mortgage or pledge of personal property, and in such a case the creditor or

surety cannot be held as the trustee of the debtor unless there is a surplus left in his hands after discharging his claim against or liability for the debtor. It seems that previous to the passage of the act referred to, general common law assignments had been sustained by the courts. They were generally made to friends for preferred creditors who kept all, or covered up the property, or returned it to the debtor. Sometimes assignees were wholly irresponsible. The act prohibited only assignments. It was held not to prohibit the transfer of property to preferred creditors or sureties.

McGregor v. Chase, 37 Vt., 225, was decided in 1864, an assignment law having been enacted, but the decision does not give its provisions. It decides that the deed, with conditions to be void if the debts were paid which it was given to secure, was a mortgage to secure debts of the grantees and for liabilities they had incurred. It was sustained as being a mortgage and not an assignment.

The case of *Lowe v. Wyman*, 8 N. H., 536, was one in which Wyman, being in failing circumstances—and a considerable portion of his property being attached and taken by his creditors—transferred to an attorney, who held a claim against him, certain notes and accounts as collateral security. The attorney collected some \$200, but not enough to pay his client. It was contended that the delivery of the notes and accounts was an assignment within the meaning of the assignment law and void, and under trustee process (garnishment) the attorney should be held liable to the plaintiff. The decision is, that the debtor may pledge his property to secure the payment of a preferred debt, and that such transfer would not be a violation of the assignment law which was, that no general assignment should be valid except it provided for an equal distribution of all the property among the creditors in equal proportion. It is said that a debtor may pledge all his property in

payment of a particular debt, and that the assignments intended by the statutes are general assignments purporting to convey all the debtor's property to trustees for the benefit of all his creditors. It appears that previous to the enactment of the assignment law, assignments were made that did not include all of the assignor's property, although so claimed; hence the act was passed requiring him when he did make an assignment to make oath that the deed included all the property he had and that it should be equally distributed, otherwise the transfer was void.

As we shall see further on, it seems to the writer that this principle must be the governing one in the case at bar. That the provisions of the assignment law of this state are intended to apply to general assignments made *as such* and with the purpose and intent of the assignor to convey his property for the benefit of all his creditors, and that no mortgage or transfer of his property as security, when not *intended* as an assignment, will be held to be such.

The case of *Barker v. Hall*, 13 N. H., 298, was where a mortgage was executed by a debtor, conveying all of his property to secure the payment of a portion of his debts, leaving others not provided for. This was held not to be an assignment within the meaning of the statute of July 5, 1834, entitled an act for the equal distribution of property assigned for the benefit of creditors.

The case of *Dana v. Stanfords*, 10 Cal., 269, was a proceeding in garnishment against mortgagees. Dietz, the debtor and judgment defendant, mortgaged all his property to Stanfords to secure debts actually due him, and indemnify him against indorsements Stanfords had made for him. From an examination of the case, it appears that it is similar in some respects to the Vermont case. Assignments had been made to friends and insolvent assignees before the enactment of the assignment law, and the

law was enacted for the purpose of preventing that species of fraud, but not intended to prevent an insolvent debtor from transferring his property directly to creditors, either absolutely in payment of his debts, or as security by way of mortgage. The mortgage was held to be fair, *bona fide*, and without fraud, and not an assignment. In the very able opinion written by Judge Field, we find a reference to the statute of some of the states. The state of New Hampshire is somewhat like our own. In Connecticut the words "In trust for creditors" occur in the act. In Ohio the words "In trust" govern assignments for creditors. In New York the statute contains the words, "In trust for the use of the person making the same," and in all these states a mortgage to the creditors has been held good.

In *Morse v. Powers*, 17 N. H., 286, a mortgage was given to secure a debt to the mortgagee and to indemnify another person against loss for having endorsed a note with the mortgagor as security. In this case it is said: "The objection that the mortgage is invalid because it is partly in trust for the benefit of Robert Morse, and thus itself in the nature of an assignment, cannot be sustained. It is not essential to the validity of the mortgage that it should be wholly for the benefit of the mortgagee, nor would the trust for the benefit of a third person of itself give it the character of an assignment within the act requiring assignments to comprehend all the property of the debtor and be without preferences."

In *Kohn v. Clement, Morton & Co.*, 12 N. W. Rep., 550 (Ia.), Waynick & Co. were in business and became indebted. They made a mortgage to Kohn Brothers upon their stock in trade, which constituted their assets, to secure several other creditors, most of them, but omitting Clement, Morton & Co., they seeking a judgment to take execution. This was held not to be an assignment, as there was no intention it should be such.

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The case is similar to the one at bar, except that Kohn Brothers, the mortgagees, were creditors, while Bonns was the agent of one of the creditors. Under the rule laid down in that case, if Bonns had been a creditor himself, instead of the agent for one of the creditors, his title to the property would have been good, so far as appears upon the face of the mortgage. We are not quite able to see why the fact that he was the agent of a creditor, and not the creditor himself, should change the rule to be applied to the instrument executed.

In *Cadwell's Bank v. Crittenden, Garnishee*, 23 N. W. Rep., 646 (Ia.), one Creager was in business and heavily indebted. Among his creditors were Smith and Crittenden, whom he had promised to secure when desired. His house and store were burned. When informed of the disaster to the property, Smith and Crittenden took assignments of all debts in Council Bluffs, where they resided, and Crittenden went to Logan, the place where Creager was in business, and procured assignments to him of Creager's book accounts, insurance policy, etc., to pay himself and other creditors in Council Bluffs. Creager was at that time indebted to the bank in Logan. This transfer to Crittenden was held not to be an assignment, that whether or not it was such depended upon the intention of the parties, as might be shown by the circumstances of the transaction. That if the conveyance is to a trustee, and the debtor intends to divest himself not only of the title to the property, but of all control over it, if it is intended as an absolute conveyance of all his property and is made for the purpose of securing a distribution of the proceeds among his creditors, or a portion of them, it is in legal effect an assignment. On the other hand, if the intention of the debtor is merely to secure his debts to one or more of his creditors, and the conveyance is not intended as an absolute disposition of his property, but reserves to himself a right therein, the conveyance will be treated as

a mortgage, even though the debtor is insolvent at the time and it covers all of his property, and but a portion of his debts are secured by it. Some reference is made to the claim that the property was conveyed to Crittenden in trust for other creditors, but it was held that while Crittenden was the trustee, yet as between him and Creager, the debtor, he was not, and as between them the debt was due to him; that he was not a trustee of Creager's appointment, but as to him the holder of all the claims.

In *Gage v. Parry*, 29 N. W. Rep., 824 (Ia.), Morse & Humphrey, who were partners, gave Baker and Jones, who were their creditors, a mortgage on their stock of goods. They also gave a mortgage to Hard, and assigned their accounts to Briscoe; then, within an hour, but not as a part of the first transaction, made a general assignment to Perry. This assignment was made before the mortgage to Hard and the assignment to Briscoe were delivered. The mortgages to Baker and Jones were held good upon the ground that the creditors of Morse & Humphrey had no lien upon the property of the firm and they, Morse & Humphrey, could do as they wished with it. They could pay or secure any or all of their creditors, with any or all of their proceeds, and such payment or security would not be effected by the assignment.

In *Waterman v. Silberberg*, 2 S. W. Rep. (Texas), 578, Marks, the mortgagor, was indebted to a large number of persons. Among his creditors was Silberberg, to whom he owed something over \$2,000. The whole indebtedness was \$15,000. Silberberg was his surety for all the debts named in the mortgage, ten in number. These debts, with that due Silberberg, amounted to over \$10,000. The mortgage was made to Silberberg to secure his debts and those for which he was surety. Silberberg took possession of the mortgaged property, which included all of the property of the debtor, and Waterman attached and levied on a part of the property, claiming that the transfer

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to Silberberg was void, as being in contravention of the assignment law, by reason of its preference of creditors. The mortgage was held valid as being a legal mortgage and not an assignment.

The case of *Tootle v. Coldwell*, 30 Kan., 125, was one in which an attachment had been issued at a suit by the plaintiff against the debtor, Coldwell. Prior to the attachment Coldwell had executed chattel mortgages on the stock of goods in his business to his wife, to secure the sum of \$2,670; to Claffin, Allen, & Co, to secure \$2,000; to P. V. Coldwell, to secure \$354, and to a number of other creditors, all of which were stated to be *bona fide*; and it was contended that these mortgages were void, as being against the provisions of the assignment law of that state, that they constituted altogether a voluntary assignment for the benefit of his creditors. In discussing this question, Judge Valentine, who wrote the opinion of the court, says: "The mortgages were not executed to a trustee as voluntary assignments under the assignment law of the state, but they were executed directly to the creditors themselves. They were not executed in the manner in which the statute requires voluntary assignments to be made."

The assignment law does not prohibit the execution of such mortgages, and being intended as such for the purpose of securing *bona fide* debts they were valid.

The case of *Scott v. McDaniel*, 3 S. W. Rep., 291, was decided during the present year. Wheat and Thompson, being indebted to various persons, conveyed to McDaniel property in trust to sell to pay certain enumerated debts described in the instrument. The debts described did not constitute all of the indebtedness of Wheat and Thompson, there being others which were not provided for. This conveyance was held not to be an assignment, and void, because of the preferences which it contained; that the assignment law has reference only to assignments made

under it, and that preference was given through instruments other than such assignments as the act contemplates are valid, unless in contravention of the act concerning fraudulent conveyances.

In *Gallagher's Appeal*, 7 Atlantic Rep., 237 (Pa.), it is held that the law of Pennsylvania seemed to prohibit preferences in the assignment, under the act, but it does not prevent a debtor from preferring his creditors, or any of them, so long as he retains dominion over his property and there is no fraud in the transaction, and it is done *bona fide*. This decision was made in 1886, and is, perhaps, a construction of an assignment law enacted after the decisions of that court hereinbefore referred to were made.

In *Jones on Mortgages*, Sec. 355, it is said it is not essential to the validity of a mortgage that it be wholly for the benefit of the mortgagee. It is not objectionable that it secures a debt due him and a debt due another, so that the mortgagee holds the mortgage partly in trust for the benefit of a third person. Such a trust does not give it the character of an assignment within the act requiring assignments to comprehend all of the debtor's property, and to be without preferences, and that a mortgage is not objectionable as an assignment for the benefit of creditors which is made to a creditor to secure a debt to him alone, or to secure a debt to him and also the debts of other creditors named.

In *Burrill on Assignments*, Sec. 6, page 12, it is said, in substance, that a mortgage resembles an assignment more closely in its leading features of being a security or provision for a debt involving a resulting interest to the grantor on a certain contingency. An assignment is more than the security for a payment of debts: it is an absolute appropriation of the property to their payment. It does not create a lien in favor of creditors, but conveys the whole title, legal and equitable, to the assignee. There remains, therefore, no equity of redemption to the property, and the trust

which results to an assignor in the unemployed balance, does not indicate such an equity.

A clear distinction is made in New York between assignments and mortgages; but as the words "in trust" are in the New York statute, the decisions do not aid us. By the New York law and decisions a debtor may make a mortgage directly to one or more of his creditors, but not to one for others, or himself and others, owing to the existence of those statutory words.

From this review of authorities cited, I conclude that the fact that the transfer was made to Bonns as trustee for the creditors named, does not necessarily destroy the instrument as a mortgage, as the statute of this state contains no provision that the existence of such trusteeship shall render the instrument void, unless it complies with the law of assignments.

The proper discussion of this case must depend upon the construction of sections 1 and 29 of the assignment law of Nebraska. Comp. Stat., Ch. 6. They are as follows:

"Sec. 1. That no voluntary assignment for the benefit of creditors hereafter made shall be valid unless the same shall be made in conformity to the terms of this act."

"Sec. 29. Every such assignment shall be void against the creditors of the assignor: *First.* If it give a preference of one debt or class of debts over another, except a preference to any person of not more than \$100 for labor or wages. *Second.* If it require any creditor to release or compromise his demand. *Third.* If it reserve any interest in the assigned property, or any part thereof to the assignor or assignors, or for his or their benefit, before his or their existing debts have been paid. *Fourth.* If it confer any power upon an assignee other or different from those contained in this act. *Fifth.* If the assignor or assignors shall fail to make the inventory required to be made by him or them by this act, within the time required by this act, the assignment shall not be void, but that the

county court may by attachment, or other proper remedy, compel the making and return thereof by the assignor. But the omission of any property or of the name or claim of any creditor therefor, shall not avoid the assignment."

By the first section no voluntary assignment for the benefit of creditors can be valid unless made in conformity to the act. Considerable of stress is placed upon the words "voluntary assignment." Burrill on Assignments, page 3, Sec. 2, defines voluntary assignments for the benefit of creditors to be: "A transfer, without compulsion of law, by debtors, of some or all of their property to an assignee or assignees, in trust, to apply the same, or proceeds thereof, to the payment of some or all of their debts, and to return the surplus, if any, to the debtor. Assignments, in this restricted sense, are distinguished with reference to their subject-matter, as being of all or of part of the debtor's property. The former are known as general assignments, in distinction from partial assignments, by which term the latter are defined. Such assignments are termed voluntary, to distinguish them from such as are made by compulsion of law, as under the statutes of bankruptcy and insolvency (the latter being sometimes termed statutory assignments), or by order of some competent court. Assignments, in the sense in which they are here employed, are usually resorted to by debtors who find themselves unable to pay their debtors in full, or the embarrassed state of whose affairs has compelled them to discontinue the transaction of business, and, in some instances, the provisions of the statutes which have been passed by the state legislature regulating and restricting the operation of such assignments are confined exclusively to assignments made by insolvents or by persons in contemplation of insolvency. But the insolvency of the debtor in his own estimation, or in fact, will not, apart from statutory provisions, unless connected with other evidences of fraud, invalidate the assignment."

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Assuming this definition of the term voluntary assignment to be the correct one, the provisions of the first section of the assignment law of this state referring to voluntary assignments, must be for the purpose of distinguishing such assignment from an involuntary assignment, as under the laws of bankruptcy. There being no such law at this time, the word "voluntary" can have no essential or particular meaning with reference to the case at bar. The statute would then be that no assignment for the benefit of creditors shall be valid unless it conform to the provisions of the act. Section 20 simply provides that such assignments shall be void unless they comply with the provisions therein contained. As we have before stated, there is no intimation that anything short of an assignment under the law shall be held to be such. In other words, the act assumes to have nothing to do with any transfer not intended as an assignment. The words "in trust," or, "in trust for the benefit of creditors," do not occur. It therefore seems quite clear that to constitute a voluntary assignment the conveyance must have been so intended by the grantor; that it must have been his purpose at the time of the execution of the instrument to make a voluntary assignment under the provisions of the assignment law, such intention to be drawn from the surrounding circumstances and by the language of the conveyance.

I am inclined to think that the statute refers only to assignments when intended as such; that is, when a debtor undertakes to make an assignment under the statute, he must make it in accordance with it, otherwise it is no assignment, and is void; and the rules relating to the construction of mortgages and other instruments somewhat akin to assignments, but not intended as such, remain unchanged; and therefore this mortgage is not an assignment, in the sense referred to in the 1st and 29th sections of the assignment law, and is not, for that reason, void.

A mortgage is a conditional transfer of property. A

voluntary assignment is absolute. The debtor has a perfect right to prefer one or any portion of his creditors, and in the absence of fraud to secure them in part or in whole by the transfer or mortgage of any or all of his property, leaving the remainder of his creditors entirely unprovided for. He has the right, if *bona fide*, to execute a chattel mortgage to a creditor on any part or all of his property to secure just debts. He may also include in such mortgage any other creditors he may desire, and the mortgage will hold for all so included. Debts may be assigned to one creditor by a portion of the others, and he can take a mortgage to himself for all who so assign and it is valid. It remains a mortgage.

I can find no case or test where the question of the validity of a mortgage to a third party is discussed but that it has been held bad, but all of these cases are in states where conveyances "in trust" are expressly prohibited, unless under certain conditions, such as the conveyance of all the property for the benefit of all the creditors. Our statute contains no such provisions.

If the mortgage had been made to Rice, Friedman, and Markell, or to any other one of the creditors direct and for the benefit of the others, it would be good under the rule laid down in *Morse v. Powers*, 17 N. H., 286; *Kohn v. Clement*, *Morton & Co.*, 12 N. W. Rep., 550; *Carter v. Rewey*, 62 Wis., 552; *Scott v. McDaniel*, 3 S. W. Rep., 291; *South Carolina Loan and Trust Co. v. McPherson*, 2 S. E. Rep., 267, and others, which we do not now call to mind.

Why would it not be as good if made to Bonns, as if made to his principal? Does the fact that Bonus was the agent of Rice, Friedman, and Markell require the application of a different rule than would have been applied if they themselves were substituted for him, or if he had been a creditor? So far as appears he had full authority to take security for the debt due them. He doubtless had

the right to take the mortgage, either to himself or to his principals. I cannot believe that the mere fact that it was so written in the mortgage should change the application of the rule.

I therefore conclude that the instruction of the court to the trial jury that the instrument referred to "is an assignment for the benefit of creditors, and as such, void under our statute, and conveyed no title to the plaintiff in this action against other creditors," was erroneous; and for that reason the judgment of the district court should be reversed.

MAXWELL, CH. J.

The elaborate and carefully prepared opinion of Judge Reese is entitled to receive and has received great consideration. He shows conclusively that at common law a debtor may prefer one or more creditors, and if this case rested upon that proposition alone, I would favor a reversal of the judgment; but even at common law a debtor could not give to one or more of his creditors a greater amount of his property than would satisfy the debt or debts, and thus hinder, delay, or defraud other creditors. Thus, suppose A is indebted to B in the sum of one thousand dollars, and is also indebted to other persons; he cannot pay B eleven hundred dollars, or any greater sum than is due to him in satisfaction of the claim. Such payment, if made, would be in excess of the amount due B, and he would hold it like any other mere *donee*. Every person holds his property in two distinct capacities: first, as owner, and second, as *quasi* trustee for the benefit of his creditors. The law therefore requires him to apply his property to the purposes to which he impliedly pledged it in procuring credit, viz., the satisfaction of his debts—in other words, the law requires the debtor to execute the trust in good faith; and if he fails to do so, the law, as

far as possible, will enforce the trust. A debtor, therefore, under the pretext of preferring certain creditors, cannot overpay them nor reserve a secret trust in the property in his own favor, and the creditor who greedily grasps and obtains more of a failing debtor's property than he is entitled to, to the exclusion of the claims of other creditors, does so at his peril. The statute against hindering, delaying, and defrauding creditors is plain and unambiguous, and there is no reason why it should not apply to a creditor who receives more than he is entitled to of a failing debtor's property. The rule of the common law allowing a failing debtor to prefer one or more of his creditors is entirely arbitrary; is contrary to justice and right, and has naught to commend it except a line of authorities. If a debtor is unable to pay his debts in full, it certainly is but justice that each creditor should be paid a fair proportion of the entire assets of such debtor. Any other rule carries upon its face the stamp of unfairness, and should as far as possible be discouraged. The general assignment law of the state prohibits preferences, except in certain trifling matters, and but for the first section of that act no doubt would control in this case. A debtor who by any instrument transfers all his property to one or more creditors, or other persons, for their benefit, has *in fact assigned it*. So far as his right, control, and possession of the property are concerned, they have passed to others, and are not to be returned to the debtor until the purposes of the trust are accomplished; and then only the residue of the property is to be returned. No refinement of definition can make such a transfer essentially different from an assignment. In the instrument under which the plaintiff claims, is the following: "And I, the said B. C. Hamilton, hereby authorize the said S. H. Bonns to take immediate possession of the same, and to sell the said property in the usual course of business, at retail and private vendue, and apply the proceeds of the sales in *pro*

Cowan v. State.

rata proportion, as the same may become due. The balance of the proceeds of the sales thereof and of the goods and chattels remaining after paying all reasonable expenses connected with the taking and selling of said property, if any there be, to be paid or returned to the said B. C. Hamilton, or his assigns, immediately upon the said notes being so paid." *Bonns v. Carter*, 20 Neb., 574. This is the language of a trust, and the trustee was the assignee named in the instrument, and as under our statute such assignments are prohibited, and declared invalid, it was of no effect. The judgment heretofore rendered is, therefore, in my view, right, and should be adhered to.

JUDGMENT AFFIRMED.

COBB, J., concurred in adhering to the former judgment.

WILLIAM COWAN, PLAINTIFF IN ERROR, V. THE STATE
OF NEBRASKA, DEFENDANT IN ERROR.

1. **Criminal Law: PRELIMINARY EXAMINATION.** Where it appears that the charge in the preliminary examination was substantially the same as that set forth in an information filed in the district court, the plea of want of preliminary examination will be unavailing.
2. ———: ———: **PLEA IN ABATEMENT.** Where it is claimed there was no preliminary examination of a party accused of crime before filing an information against him in the district court, the question should be raised by a plea in abatement.
3. ———: **OBTAINING MONEY BY FALSE PRETENSES.** Where in an information against a party for obtaining money by false pretenses it is alleged that, "by reason of the false pretenses," the accused obtained the money, the words of the statute being, "by false pretense," *Held*, The allegation was sufficient.

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24	237
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26	163
22	519
28	865
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42	511
43	418
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46	147
22	519
44	421
22	519
45	276
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49	700
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54	184
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4. ———: ———: EVIDENCE. In a prosecution against a party for obtaining money under false pretenses from a bank, the note given by him for the money and mortgage to secure the same, when introduced in evidence, are sufficient in that case to prove the *de facto* existence of the bank. *People v. Hughes*, 29 Cal., 260. *Platte Valley Bank v. Harding*, 1 Neb., 461.
5. ———: EVIDENCE. Except in cases where it is necessary to show guilty knowledge, it is not admissible to prove that at another time and place the accused committed or attempted to commit a crime similar to that with which he stands charged.
6. ———: REASONABLE DOUBT. The court in defining a reasonable doubt, said: "It is a doubt for having which the jury can give a reason, based upon the testimony." *Held*, Erroneous and calculated to mislead.

ERROR to the district court for Valley county. Tried below before TIFFANY, J.

M. Randall (*E. W. Metcalf* with him), for plaintiff in error, cited: *State v. Chunn*, 19 Mo., 233. *State v. Locke*, 35 Ind., 419. *Commonwealth v. Young*, 15 Gratt., 664. *Enders v. People*, 20 Mich., 233. *State v. Saunders*, 63 Mo., 482. *Maxwell's Crim. Proc.*, 129. 3 Greenleaf Ev., Sec. 88. *Abbott v Omaha Smelting Co.*, 4 Neb., 420.

William Leese, Attorney General, and *E. J. Clements*, for the state, cited *Maxwell's Crim. Proc.*, 130. 2 Chitty Crim. Law, 1002. *Credit Foncier v. Rogers*, 10 Neb., 184. *People v. Hughes*, 29 Cal., 260.

MAXWELL, CH. J.

The plaintiff was convicted of the crime of obtaining money under false pretenses, in the district court of Valley county, and sentenced to imprisonment in the penitentiary. The charge in the information on which he was convicted is as follows: "That on or about the 12th day of March, in the year of our Lord one thousand eight hundred and eighty-six, in the county of Valley and state of Nebraska,

one William Cowan unlawfully and feloniously did falsely pretend to the First National Bank of Ord, Valley county, Nebraska, a corporation organized under the laws of the United States, and doing business in Valley county, Nebraska, that he, the said William Cowan, was the owner of forty red cows, branded with a heart on the right hip; fifteen red and white cows, branded with a heart on right hip; two white cows, branded with a heart on right hip; one red bull, three years of age, branded with a heart on right hip; one black stallion colt, three years of age, and one bay mare colt, three years of age; and after having conveyed to the First National Bank of Ord, aforesaid, the above described property by chattel mortgage, obtained from the said First National Bank of Ord, by reason of the false pretense aforesaid, two hundred dollars in money of the value of thirty-five dollars and upwards, to-wit: Of the value of two hundred dollars, with the intent then and there and thereby unlawfully and feloniously to cheat and defraud said First National Bank of Ord of the two hundred dollars, so as aforesaid falsely and fraudulently obtained, whereas in truth and in fact he, the said William Cowan, was not the owner of the forty red cows aforesaid, and was not the owner of the fifteen red and white cows aforesaid, and was not the owner of the one red bull aforesaid, and was not the owner of the one bay mare aforesaid, and was not the owner of the one black stallion aforesaid. He, the said William Cowan, then and there well knowing said false pretense to be false."

A motion was filed to quash this information, which motion was overruled, which is now assigned for error.

The principal ground relied upon for quashing the information was, that it did not appear that there had been any preliminary examination of the accused for the specific offense charged in the information before instituting this prosecution in the district court. It does appear, however, that a complaint was filed against the accused charging

him with mortgaging property to which he had no claim or title, and thereby procured the money which it is alleged he fraudulently obtained. This, in our view, is sufficient, and it is apparent that the offense charged in the complaint is the same as that for which the accused now stands charged in the information. The proper mode of raising an objection of that kind is by a plea in abatement and not by motion. This objection, therefore, was properly overruled.

2. It is claimed that the information is insufficient because of the words of the charge "by reason of the false pretenses" he obtained the money, instead of the statutory words "by false pretense or pretenses," but, in our view, the words used in the information mean substantially the same as the statutory words. The objection to the information, therefore, is unavailing.

3. In the examination of the jurors on their *voir dire*, one W. D. Caste was sworn and examined, as follows:

Q. Did you say you had formed an opinion as to the guilt or innocence of the defendant as to the particular crime of which he is charged?

A. Yes, sir.

Q. From what source did you derive that opinion?

A. From what I heard from the different parties.

Q. Parties interested in the transaction?

A. I think there is one of them.

Q. Relative of the defendant?

A. No, sir.

Q. Parties who claimed to own the property?

A. No, sir.

Q. From what you heard you formed an opinion as to his guilt or innocence?

A. I did.

Q. Have you that opinion still?

A. I have it yet, yes, sir.

Q. Is that a positive opinion or conditional upon what you heard being true?

A. Of course it is on what I heard being true.

Q. Notwithstanding that opinion, are you able to sit here upon the jury and listen to the testimony produced and the instructions of the court and render a verdict entirely free from the opinion you now have?

A. I think I could.

Q. Are you prepared to say positively you can?

A. Yes, sir, I certainly could.

The challenge for cause was thereupon overruled, to which defendant below excepted.

Section 468 of the criminal code provides, "that if a juror shall state that he has formed or expressed an opinion as to the guilt or innocence of the accused, the court shall thereupon proceed to examine, on oath, such juror as to the ground of such opinion; and if it shall appear to have been founded upon reading newspaper statements, communications, comments, or reports, or upon rumor or hearsay, and *not* upon conversations with witnesses of the transactions, or reading reports of their testimony, or hearing them testify, and the juror shall say, on oath, that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and evidence, the court, if satisfied that such juror is impartial, and will render such verdict, may, in its discretion, admit such juror as competent to serve in such case."

The proper construction of this section was before the supreme court in *Curry v. State*, 4 Neb., 548 and 549, and it is said, "where the ground of challenge is the formation or expression of an opinion by the juror, before the court can exercise any discretion as to his retention upon the panel, it must be shown by an examination of the juror, on his oath, not only that his opinion was formed solely in the manner stated in this proviso, but in addition to this, the juror must swear, unequivocally, 'that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and evidence.' If he expresses the

least doubt of his ability to do so, he should not, in the face of a challenge for cause, be retained. And even where by his formal answers the juror brings himself within the letter of the statutory qualification, if the court should discover the least symptom of prejudice or unfairness, or an evident desire to sit in the case, he should, in justice both to the state and the accused, be rejected."

This juror was clearly incompetent. Evidently his opinion was formed from conversations with those who professed to know the facts, and no doubt were called, or could have been called as witnesses in the case. Where an opinion is formed by conversation with such witnesses, the party is incompetent to sit as a juror, notwithstanding he may swear that he can render a fair and impartial verdict. But few persons called as jurors will admit that they cannot render a fair and impartial verdict, notwithstanding their opinions, and, in most cases, no doubt, they intend to do so, but there is danger of their bias affecting the verdict; the court, therefore, erred in retaining this juror. But as the error is not assigned in a motion for a new trial it is unavailing.

4. Objection is made that there is no proof of the incorporation of the First National Bank of Ord, and that, therefore, there is no person to be defrauded. The state, however, introduced a promissory note for the sum of two hundred dollars, signed by the accused, and also a chattel mortgage upon the stock described in the information, also signed by him and given to such bank, these instruments being those upon which the charge in this case was founded. This, so far as the accused is concerned, is proof of the *de facto* existence of the bank. *People v. Hughes*, 29 Cal., 260. *Platte Valley Bank v. Harding*, 1 Neb., 461. The objection, therefore, is untenable.

5. On the trial of the cause, the state was permitted to introduce testimony to show that the accused had in two other cases, entirely distinct and separate from that under

consideration, obtained goods under false pretenses. This was entirely unauthorized, and could not fail to be prejudicial to the accused. Except in cases where it is necessary to show guilty knowledge, it is not admissible to prove that at another time and place the accused committed, or attempted to commit, a crime similar to that with which he stands charged, as it cannot be expected the accused will be prepared to disprove collateral attacks of this character. The law therefore excludes such evidence. *Smith v. State*, 17 Neb., 358.

6. The court, in the third instruction, said to the jury, "You are instructed that, by a reasonable doubt is meant such a doubt as naturally arises in the mind of the jury from a consideration of the evidence as to cause them to pause and hesitate, and act as in the most important affairs of theirs. It is a doubt for having which the jury can give a reason, based upon the testimony. To be convinced beyond a reasonable doubt, is to have the judgment and the reason of the jury satisfied, so they would go forward unhesitatingly and act as under like circumstances of their own."

The words, "It is a doubt for having which the jury can give a reason, based upon the testimony," were certainly calculated to mislead, and, no doubt, did mislead the jury. The definition of a reasonable doubt, given by Chief Justice Shaw in *Commonwealth v. Webster*, 5 Cush., 295, is, that the evidence must be such as to "establish the truth of the fact to a reasonable and moral certainty, a certainty that convinces and directs the understanding and satisfies the reason of those who are bound to act conscientiously upon it." This seems to be a correct definition of a reasonable doubt.

7. There is testimony in the record from which the jury would have been warranted in finding that the accused, although not the owner of the property in question, nevertheless had authority to mortgage the same. This should have been submitted to the jury.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

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CHARLES L. ROTHELL ET AL., PLAINTIFFS IN ERROR,
V. WILLIAM GRIMES, DEFENDANT IN ERROR.

1. **Fraud: INSOLVENCY OF MORTGAGOR.** The insolvency of a mortgagor, although a circumstance which may be taken, together with other material facts, to show a fraudulent design in disposing of property, is not of itself sufficient to establish it.
2. **Debtor and Creditor: RIGHTS OF CREDITOR.** A creditor may obtain from a failing debtor payment of his claim, provided he acts in good faith and receives no more than sufficient to satisfy the debt.
3. **Partnership: INSOLVENT FIRM.** Where a firm is insolvent, the partnership property will be applied to the partnership debts, and a creditor of a member of the firm cannot be paid out of the partnership property to the exclusion of creditors of the firm.
4. ———: **CHATTEL MORTGAGE.** A mortgage of partnership goods, given to secure the sureties on a bond of a member of the firm for the faithful performance of his duties as guardian, is not available as against creditors of an insolvent firm.

ERROR to the district court for Johnson county. Tried below before BROADY, J.

S. P. Davidson, for plaintiff in error, cited: *Dinsmore v. Stimbert*, 12 Neb., 435. *Grimes v. Farrington*, 19 Neb., 45. *Frankhouser v. Ellett*, 22 Kan., 127. *Bonns v. Carter*, 20 Neb., 577. *Kay v. Noll*, Id., 389. *Read v. Wilson*, 22 Ill., 377. *Jones' Chattel Mortgage*, Sec. 351. *Tul's Case*, 3 Neb., 262. *Roop v. Herron*, 15 Neb., 78.

Daniel F. Osgood (*Isham Reavis* with him), for defendant in error, cited: *Herman Chattel Mortgages*, Sec. 104. *Beal v. Williamson*, 14 Ala., 55. *Rich v. Levy*, 16 Md., 74. *Roop v. Herron*, 15 Neb., 73. *Nixon v. Nash*, 12 Ohio State, 647. *Belknap v. Wendell*, 31 N. H., 92. *Wallach v. Wylie*, 28 Kan., 138. *Winner v. Hoyt*, 28 N. W. R., 380.

MAXWELL, CH. J.

In March, 1887, the plaintiffs commenced an action in replevin in the district court of Johnson county to recover possession of certain goods and chattels of the value of \$400. It is alleged in their petition that under and by virtue of a chattel mortgage made and delivered to plaintiffs on the 11th day of March, 1887, by E. M. McGee and William S. Kearney, and McGee & Kearney, a partnership, to secure a note of \$2,000, plaintiffs hold a special ownership in and are entitled to the possession of the goods in controversy (particularly describing them); that on and before March 16th, 1887, they were in the lawful possession of said property under said chattel mortgage, and were proceeding to sell said property and apply the proceeds thereof in satisfaction of said debt secured thereby in as expeditious, safe, and judicious a manner as possible in pursuance of said mortgage; that while plaintiffs were thus in possession thereof, on said 16th day of March, 1887, said goods and chattels were forcibly and wrongfully taken from the possession of plaintiffs by defendant in the night time; that by reason of the said wrongful taking of said property, and by reason of the negligent and careless handling of the same by defendant, the same have been damaged to the amount of \$200; that when so taken by defendant said goods and chattels were worth \$400, and they filled out and completed the assortment of the stock then being sold under said chattel mortgage by plaintiffs, and by reason

of these goods in controversy being so taken, said assortment was broken up and destroyed, and plaintiffs were damaged thereby in the further sum of \$200; that at the time said McGee & Kearney made and delivered said chattel mortgage they were the owners of all said goods and chattels and said stock of goods, and had a right to sell or dispose of them by mortgage, and at the same time they delivered possession of said goods and chattels to plaintiffs; that all of said property so mortgaged and delivered to plaintiffs, including the goods in controversy, are not sufficient to pay the said debt secured by said mortgage; that defendant now still wrongfully detains said goods and chattels so taken, and has so wrongfully detained the same for more than six hours, to the further damage of plaintiffs of \$100, making plaintiffs' damages by reason of the premises aggregate the sum of \$500.

The defendant in his answer denies, 1st. All the allegations of plaintiffs' petition. He alleges that he is sheriff of said county, and as such on March 16th, 1887, he levied on the goods in controversy under an order of attachment duly issued against E. M. McGee and W. S. Kearney as their property, and that he had no notice of any interest or lien, by virtue of a chattel mortgage, or otherwise, of plaintiffs upon said property; that at the time plaintiffs took possession of the goods in controversy, by virtue of a pretended chattel mortgage, E. M. McGee and W. S. Kearney, who gave said pretended chattel mortgage, were indebted in large amounts for goods purchased, and on which said mortgage was given, of which fact plaintiffs were knowing, and said mortgage was given and taken with the intent to defraud, hinder, and delay said creditors; that there is no description in said plaintiffs' mortgage of the property sought to be recovered, and therefore plaintiffs are not entitled to recover in this action; that said pretended mortgage was given without consideration, and void as to judgment creditors, and therefore void as to this de-

fendant; that said mortgage was given to secure an amount largely in excess of any genuine *bona fide* indebtedness of E. M. McGee and W. S. Kearney, mortgagors, to plaintiffs, and was taken by plaintiffs and given by said mortgagors with the intent to hinder and delay judgment creditors of said mortgagors in the collection of their debts, and therefore void as to the judgment creditors and this defendant.

The plaintiffs in their reply to said answer admit that defendant is sheriff of said county, and that their claim to said property is by virtue of a chattel mortgage executed by E. M. McGee and W. S. Kearney, but allege that said mortgage was given to secure a valid debt, and taken in good faith to secure said indebtedness, and without any intention to hinder and delay, or defraud the creditors of said McGee & Kearney, and they deny each and every other allegation in said answer contained.

On the trial the cause was submitted to the court, which found for the defendant, that the value of his possession was \$176.55, and that his damages were \$1.

The plaintiff then filed a motion for a new trial, upon the following grounds:

1st. Court overruled plaintiffs' objection to and admitting improper testimony offered by defendant.

2d. Court erred in sustaining defendant's objection to and refusing to admit proper testimony offered by plaintiffs.

3d. Said finding is contrary to the evidence.

4th. Said finding is contrary to law.

5th. Error of law occurring at the trial.

6th. Because said finding and judgment should have been for plaintiffs.

7th. Error of the court in the exercise of discretion in the cross-examination of plaintiff, Charles L. Rothell, and in the cross-examination of the other plaintiffs, which prevented plaintiffs from having a fair trial.

8th. Error in assessing defendant's damages too high, and in assessing value of defendant's possession, as no amount is alleged in the answer as the value of defendant's claim.

The motion was overruled, and the cause brought into this court by petition in error.

It is apparent from the testimony that there are a large number of other attachment suits against McGee & Kearney, and levied upon the property in question, which seem to be awaiting the decision in this case. The testimony shows that on the 11th day of March, 1887, McGee & Kearney executed a chattel mortgage upon their stock of goods in their store at Crab Orchard, Johnson county, to secure the sum of \$2,000, payable March 21st, 1887, with a provision in the mortgage that if the mortgagees should at any time deem themselves unsafe, they could declare the mortgage due, and proceed to sell the goods, either at public or private sale. The mortgage was made on the night of the 11th of March, 1887, and the next morning at 7 o'clock the mortgagees declared that they deemed themselves insecure, and thereupon took possession of the store and goods. On the 16th of that month the attachment, under which the defendant claims the goods, was levied on the same. There is a very large amount of testimony in the record which is exceedingly vague and indefinite upon the following points: 1st. The value of the goods mortgaged at the time the mortgage was executed. 2d. The actual amount owing by the firm of McGee & Kearney to the mortgagees, or any of them. 3d. The amount of the individual debts of McGee or Kearney to some or all the mortgagees. The testimony shows beyond question that some of the mortgagees loaned money to the firm of McGee & Kearney, and the bank of J. D. Russell & Co. seem to have loaned certain sums to the mortgagors, which claims were assigned before the mortgage was executed to one of the mortgagees, but the exact amount of these claims is uncertain.

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That a creditor may secure the payment of his claim from a failing debtor, provided he acts in good faith and obtains no more property than will satisfy his claim, is well established in this court. *Leffel v. Schermerhorn*, 13 Neb., 342. *Shelly v. Heater*, 17 Neb., 505. The testimony in the case, however, leaves it entirely uncertain upon the points named, and it was therefore impossible for the trial court to say that the sale was fraudulent.

2. Where a firm is insolvent, the partnership property is liable, first, for the partnership debts, and a creditor of a member of the firm cannot be paid out of the partnership property to the exclusion of creditors of the firm. *Caldwell v. Bloomington Manufacturing Co.*, 17 Neb., 489. *Bowen v. Billings*, 13 Neb., 439. *Roop v. Herron*, 15 Neb., 74. The creditors of the firm, therefore, will be preferred to the individual creditors.

3. The testimony shows that \$200 of the amount of the mortgage was to secure a contingent claim of some of the mortgagees upon a guardian's bond of McGee. This cannot prevail against the creditors of the firm.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

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GEORGE F. DOWNIE, PLAINTIFF IN ERROR, V. SCOTT M.
LADD, DEFENDANT IN ERROR.

1. **Negotiable Instruments: ACTION ON NOTE: SATISFACTION BY CONVEYANCE OF PROPERTY.** Where in an action on a promissory note the defendant set up in his answer a contract entered into between the parties for the conveyance of certain property in full satisfaction of the debt, and alleged a perform-

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ance in compliance with the contract, and there was testimony tending to sustain the answer, *Held*, That in case of defect of title of, or incumbrance on, part of the property so conveyed, the measure of damages was not the amount of the note less the value of the property conveyed, but the amount of the incumbrances, or value of the property to which the title had failed.

2. **Trial: ISSUES.** Where parties have made up the issues in a case without objection to the particular form of the action, they will be held to have waived any errors in that regard.

ERROR to the district court for York county. Tried below before NORVAL, J.

France & Harlan, for plaintiff in error.

Contract was compromise and settlement. *Baldwin v. Davis*, 63 Iowa, 231. Courts will not disturb it. *Prichard v. Sharp*, 51 Mich., 432. Action should have been on contract, not note. *Billings v. Vanderbeck*, 23 Barb., 546.

Sedgwick & Powers, for defendant in error, cited: 2 Parson Contracts, *681. *Goodrich v. Stanley*, 24 Conn., 613.

MAXWELL, CH. J.

This action was brought in the district court of York county upon the following promissory note:

"On or before one year from date, for value received, I promise to pay John Ladd, or bearer, (\$484.83) four hundred and eighty-four and $\frac{83}{100}$ dollars, with use at eight per cent per annum until paid.

"Dated Sharon, Walworth Co., Wisconsin state, June 18th, 1880.

"(Signed.)

GEORGE F. DOWNIE."

The defendant below in his answer admits the making and delivery of the note, but alleges that after the execution of the same he entered into the following contract with the plaintiff:

Downie v. Ladd.

"YORK, NEB., June 12th, 1882.

"Whereas, John Ladd and Scott M. Ladd hold a certain contract and note against George F. Downie, on which contract there is due \$1,000 and interest, and on which note there is due \$484.83 and interest; and whereas, said Downie has this day turned out and sold to said J. and S. M. Ladd, upon said indebtedness, all his property in New York, Nebraska, and other property. Now if the said Ladd gets full title unincumbered in and to the following property, to-wit, lot 15 and north half of lot 14, in block 32, in the village of New York, in said York county, Nebraska, and the two buildings north of B. F. Marshall's blacksmith shop, 1 iron lathe, 1 blower, counter shaft, scales, sledge, three riddles, flasks, sand cupola, wagon drill, note of Kilner & Olcott on which there is due \$250 and interest, the said John Ladd paying \$130 to redeem said note, one bake oven, and emery stand used as counter shaft, then the said note of said Downie and said contract are to be canceled and the said property taken in full liquidation of said indebtedness.

"J. AND S. M. LADD,

"By Sedgwick & Powers, Attorneys.

"GEORGE F. DOWNIE."

Downie claims to have fully performed said contract on his part.

The plaintiff in his reply "admits the making of the agreement set forth in the defendant's answer, but denies that said defendant performed all the conditions of said contract and agreement on his part to be performed; and denies that the said Ladd, nor John Ladd, got full title unincumbered in and to the property conveyed to him and described in said agreement; and plaintiff denies that he or John Ladd has ever got full title unincumbered to lot 15 and north half of lot 14, in block 32, in village of New York, Nebraska; and except as hereinbefore expressly admitted this plaintiff denies each and every allegation of new matter in said answer contained."

On the trial of the cause the court found for the plaintiff below, and rendered judgment for the sum of six hundred seventy-five and $\frac{43}{100}$ dollars.

The testimony shows that Ladd obtained all the property set forth in said contract except a part of lots 14 and 15, and that the value of such interest was about \$150. It will be observed that the contract provides that the property therein described, if unincumbered, was to be accepted in full satisfaction of the debt. The plaintiff below is shown to have retained all the property obtained under the contract, and can only recover for such damages as he may have sustained by reason of defects of title or incumbrances on the property. The court below seemed to have computed the amount due on the contract set forth in the answer, and also the amount due on the promissory note set forth in the petition, and deducted therefrom the sum of \$1,200 as the value of the interest of Downie in the property conveyed to Ladd, and rendered judgment against Downie for the balance. In this we think the court erred.

The plaintiff in error contends that the action should have been brought on the contract and not on the note. This objection, however, is unavailing, as the plaintiff in error practically assented to this mode of procedure in the court below by failing to object in making up the issue, and cannot be heard now to complain on that ground. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

EX PARTE JOHN CARR.

1. **Counties: CRIMES IN UNORGANIZED COUNTIES: VENUE.**
Under Chap. 10 of the Revised Statutes of 1866, all unorganized counties were attached to the nearest organized county directly east, for election, judicial, and revenue purposes; therefore, where a murder was alleged to have been committed in the county of Sioux, the party accused of committing the same could not be indicted and tried for the offense in Cheyenne county, it being directly south of Sioux county.
2. **Criminal Law: LOST INDICTMENT.** Where the record of the indictment against a party accused of committing a crime has been omitted or lost or destroyed, the court will receive secondary evidence as to the essential facts stated in the indictment which conferred jurisdiction on the trial court.

HABEAS CORPUS.

Marquett, Deweese & Hall, for the writ.

William Leese, Attorney General, contra.

MAXWELL, CH. J.

The defendant was indicted in Cheyenne county in the year 1877 for the murder of one William Love, and convicted and sentenced to the penitentiary for life. This is an application for a writ of habeas corpus to discharge him, on the ground that the offense was not committed in Cheyenne county, and that therefore the district court of that county had no jurisdiction. The records of Cheyenne county, without any fault of the relator, fail to show the original or any copy of the indictment, hence we are compelled to rely upon secondary evidence as to the county in which the offense was charged to have been committed. One J. C. Lane, a witness on behalf of Carr, makes the following affidavit:

Ex parte Carr.

"STATE OF NEBRASKA,
LANCASTER COUNTY. } ss.

"J. C. Lane, being duly sworn on his oath, says that he is well acquainted with John Carr, the applicant for a writ of habeas corpus in this case, and has known said Carr since A.D., 1876; that affiant is well acquainted with the proceedings and prosecution of said Carr by the state of Nebraska, for the alleged killing of William Love; that affiant knew the said Carr when the said Carr lived in Cheyenne county, and also while said Carr was confined in the county jail of said Cheyenne county; that this affiant was in Sidney at the time said Carr was indicted, and also at the time he was tried for the alleged killing of one William Love; that affiant well remembers the facts and the circumstances connected with the alleged killing of William Love by the said Carr; that at the time the said killing took place this affiant was in the employ of Major Mayberry, who owned a large amount of cattle in that country, and this affiant was working on the Platte river, at Camp Clark, for the said Major Mayberry, at the time the killing took place; that in the summer following the killing of said Love, affiant was in the employ of said Major Mayberry, and was engaged in gathering cattle over on Snake creek, in the immediate vicinity where the killing took place, and where the body of said Love was buried; that affiant had several times seen the grave where William Love was said to be buried, and it was generally known and understood and spoken of as the grave of said William Love, who was killed by the said John Carr; that affiant has resided in the country above described, to-wit, in about Camp Clark and over on Snake creek, and has traveled through the country both as a freighter and a herder of cattle from the time the said Love was killed until the year 1884, and that affiant is well acquainted with all the country in and about where the said Love was said to be killed; that affiant knows

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the line that divides Cheyenne county from the unorganized territory of Sioux, and knows that the grave said to be the grave of William Love is in what was then the unorganized territory of Sioux, and it is understood by everybody in that vicinity that the body was buried by some freighters where it was found; that affiant having been acquainted with the said John Carr, when he learned that he was arrested and indicted for killing a man, interested himself in Carr's behalf to a certain extent, and went to the jail to see Carr, and also saw Carr in the court room at the time he was tried; that affiant was shown the indictment by the said Carr, and affiant read the indictment, and talked over the matter with the said Carr as to how he came to kill the said Love and all the circumstances connected therewith, and where the killing took place, and how he killed him, etc., and this affiant knows the contents of the said indictment, and well remembers that the said indictment charged the said Carr with the killing of one William Love in the unorganized territory of Sioux; that affiant and John McCarty, who was then sheriff of the county, were intimate friends, and affiant was acquainted with the said McCarty a long time, and was with the sheriff and in his office several times, and that affiant and the sheriff were having a conversation in regard to where the killing was done, and the circumstances in connection with the killing, and in connection with the conversation, the sheriff got the indictment and he and this affiant read it over together and talked the matter over at the time, and the affiant is confident that the said indictment charged the said Carr with killing a man by the name of William Love in the unorganized territory of Sioux."

Lane is corroborated substantially by G. B. Moore, W. F. Payne, L. H. Bordwell, Geo. H. Jewett, and Fonce Reins. A letter of V. Bierbower, who was assigned as counsel to defend Carr, is also in the record, from which it appears that Carr is a "Norwegian, and (at that time)

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could scarcely speak any English. He could explain nothing, and I remember, we could find no interpreter in the town. I have always thought, and still think, that Carr never deserved that sentence. He was literally railroaded through his trial." Bierbower, therefore, being unable to get at any of the facts in the case from his client, and apparently finding a strong public sentiment against him, advised his client to plead guilty to murder in the second degree, although his client claimed the act was committed in self-defense.

The offense, however, is clearly shown to have been charged to have been committed, and to have actually been committed, in Sioux county, and not in Cheyenne county.

Chapter 10, of the Revised Stat. of 1886, which were in force when this trial took place, provides that, "All unorganized counties shall be attached to the nearest organized county directly east of them for election, judicial, and revenue purposes."

The court will take judicial notice that Sioux county, as it existed at the time of this trial, was directly north of Cheyenne county. The grand jury of Cheyenne county, therefore, and also the district court of that county, had no jurisdiction in the premises. This is not a case where there had been a change of venue, or the court had directed the finding of an indictment in Cheyenne county, if, indeed, it would have had any authority so to do. The prosecution was instituted in Cheyenne county as a matter of right, and was clearly without authority of law. The court thus being without jurisdiction, its judgment is a nullity and is held for nought.

As no prosecution seems to have been instituted against the petitioner in Sioux county, the clerk is directed to notify the proper authorities of that and Box Butte counties of the action of the court herein, and within twenty days from the time of receiving such notice, such authorities can, if they so desire, institute proceedings to prosecute

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such charge ; and in case of failure to do so, the petitioner will be discharged from imprisonment.

JUDGMENT ACCORDINGLY.

COBB, J., concurs.

REESE J., dissenting.

I cannot agree to the conclusion reached in this case by the majority of the court, and will briefly give some of my reasons therefor, without elaboration or the citation of authorities.

While I entertain no degree of disrespect for Hon. V. Bierbower, who defended petitioner upon his trial, yet I do not believe an unsworn statement, from him or any other person, in the form of a letter to the present counsel for petitioner, should have any legal weight attached to it, nor should it be considered as evidence in any form. The law provides a method of taking testimony ; that method should be followed. I find among the files in this application a letter from Hon. William Gaslin, who was the presiding judge at the time of the conviction of petitioner, in which he says he does not remember much about the case, and, therefore, has no recollection as to the allegations of the indictment. If letters are to be considered, I am persuaded that if that judge had consigned a person to imprisonment *for life*, upon an indictment alleging the offense to have been committed in a part of the state over which his court had no jurisdiction, he would have remembered it. It would take very strong proof indeed, to convince me that he would have done so, or that Hon. C. J. Dilworth, who was at that time district attorney and present in court, prepared the indictment and conducted the prosecution, and who was shortly afterwards elected to the office of attorney general of the state, would have been a party to any such proceeding.

It is true that affidavits are presented by which it is sought to be established that such were the facts, but those affidavits, if competent evidence at all, were made nearly ten years after the conviction, by men of whose intelligence or probity we know nothing, and some, if not all of whom, are personally friendly to the petitioner. If the solemn adjudications of our courts can be overturned in this way, then it seems to me there is not much "faith and credit" to be given them. Lost indictments may become common, and the courts be besieged with applications for writs of *habeas corpus*. Suppose the authorities of Sioux county should institute a criminal prosecution against petitioner for murder, and pending the proceeding the indictment upon which he was convicted should be found, and it should contain the allegation that the murder was committed in Cheyenne county, with his plea of guilty therein, as shown by the records before us; this would afford a complete bar to any other prosecution, and he would be entitled to his immediate discharge; for, if it was so alleged and thus admitted, it would be wholly immaterial whether the crime was, in fact, committed on the north or south side of the county line.

Again, the record before us shows that the defense of petitioner was conducted by Messrs. Bierbower and Heist, the latter of whom still resides in Sidney. Neither of those men furnishes an affidavit as to the contents of the indictment, nor does Mr. Bierbower, in his letter, state that it was alleged that the crime was committed in the unorganized territory. Now, can it be believed that if petitioner was "railroaded through his trial" on a void indictment, those attorneys, who are of respectable ability, to say the least, would have tamely submitted to any such proceeding without coming to the supreme court and procuring his discharge? I think not.

GEORGE W. FORBES, PLAINTIFF IN ERROR, V. LOUIS
THOMAS, DEFENDANT IN ERROR.

23 541
45 317

1. **Trial: VERDICT.** Where the testimony is conflicting and pretty evenly balanced, the finding of a trial jury thereon will not be disturbed even if the testimony seems to preponderate in favor of the losing party.
2. **Evidence examined, and Held,** To support the finding of fact necessary to support the verdict.
3. **Fraudulent Representations and Concealment: EFFECT OF DISCHARGE IN BANKRUPTCY.** Where A, being indebted to B in the sum of \$10,000, procured C to execute to B a note and mortgage for \$2,650, with the statement that B would furnish the \$2,650 to C as a loan, the proceeds of such loan to be applied to the payment of a mortgage on the real estate included in the mortgage to B, amounting to over \$1,200, and \$900 thereof to be applied to the payment of a note for that amount, held by A against C and another, the remainder to be paid in cash to C, but A concealed from C all knowledge of his indebtedness to B, and instead of procuring the \$2,650, procured only \$1,000, and applied the \$1,650 to the payment of his own indebtedness to B, without the knowledge or consent of C, and, at the time of making the contract, A was not the owner of the \$900 note and could not deliver it to C, having transferred it to another long prior thereto as collateral to secure an unpaid debt: it was *Held*, That the concealment of the indebtedness of A to B, and the appropriation of the money thereon, and the concealment of the fact that the \$900 note had been transferred and could not be delivered, were a fraud upon C, and created a liability which a discharge in bankruptcy, under the provisions of the bankrupt law of the United States then in force, could not affect.
4. —: **MEASURE OF DAMAGES.** In such case the measure of C's damages in an action against A would be the \$1,650 and legal interest thereon, notwithstanding the fact that by the increased mortgage liens on C's land he was unable to borrow sufficient to discharge them, and by subsequent foreclosure proceedings the land was sold and C's title destroyed.
5. —: **EVIDENCE: ERROR WITHOUT PREJUDICE.** In such case the refusal of the trial court to permit A to testify that in the transaction he acted in good faith and intended to surrender

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the notes, and believed he could do so, if error at all, would be without prejudice, the notes never having been surrendered or tendered.

6. **Error without prejudice will not require the reversal of a judgment.**
7. **Limitation of Action.** The cause of action accrued in 1875. In 1877, plaintiff in error, who was in business in O., in this state, changed his place of business to D., in Dakota territory. From that time until 1880 his family remained in O., when his wife joined him in Dakota, and remained there about four months. In 1881 his family all joined him in Dakota. The principal part of the time from 1877 until 1881 his family resided in the place occupied by him previous to his departure. He occasionally visited O., but did not make that his usual place of abode. *Held*, That these facts, together with other circumstances and testimony submitted to the jury, were sufficient to sustain the finding that his "usual place of residence" was not in O., and that the statute of limitations did not run in his favor.

ERROR to the district court for Douglas county. Tried below before NEVILLE, J.

George W. Doane, for plaintiff in error, upon the question of the effect of the discharge in bankruptcy, cited: *Cronan v. Cotting*, 104 Mass., 245. *Seymour v. Street*, 5 Neb., 93. On statute of limitations. *Blodgett v. Utley*, 4 Neb., 25. *Hedges v. Roach*, 16 Id., 673. *Sage v. Hawley*, 16 Conn., 106. *Campbell v. White*, 22 Mich., 193. *Gilman v. Cutts*, 3 Foster, 376.

Henry D. Estabrook, on same side, upon question of fraud, cited: *Commonwealth v. Brenneman*, 1 Rawle, 311. *Miller v. Howell*, 2 Ill., 499. *Perkins v. Lougee*, 6 Neb., 220. *Fisher v. N. Y. Com. Pleas*, 18 Wend., 608. On question of discharge in bankruptcy. *Zeperink v. Card*, 11 Fed. Rep., 295. *Hennequin v. Clowe*, 111 U. S., 676. *Neal v. Clark*, 95 Id., 704. On measure of damages. *Barmon v. Lithauer*, 4 Keyes, 317. *Sutherland*, 190. *Freeman v. Venner*, 120 Mass., 424.

John L. Webster, for defendant in error, on question of discharge in bankruptcy, cited: *Neal v. Clark*, 95 U. S., 704. *Strang v. Bradner*, 114 Id., 555. *Brown v. Broach*, 52 Miss., 536. *Jones v. Clark*, 25 Gratt., 642. *Stokes v. Mason*, 10 Rhode Island, 261. Statute of limitations. *Seymour v. Street*, 5 Neb., 88. *Conrad v. Nall*, 24 Mich., 275. *Lane v. National Bank*, 6 Kan., 74.

REESE, J.

This action was instituted in the district court of Douglas county, by defendant in error against plaintiff in error, by which he sought to recover the sum of \$10,000 damages resulting from fraudulent representations and conduct of plaintiff in error. The cause of action stated in his petition is, that on the 23d day of April in the year 1875, he was the owner in fee simple of the west half of section fifteen, township sixteen, range twelve, in Douglas county, Nebraska, and that at said date there was a mortgage on the premises to one Barker, in the sum of \$1,200 and interest from April 8th in the year 1872, all of which was then due and payable; that defendant in error, being desirous of paying off said mortgage to Barker, applied to plaintiff in error for a loan of \$2,650, to be secured by a mortgage on the real estate; that plaintiff in error was then indebted to one William Vorse in a large sum of money, which he concealed from defendant in error, and which was unknown to him, and to enable the plaintiff in error to cancel a part of his own indebtedness to Vorse procured defendant in error to execute a note to Vorse in the said sum of \$2,650, bearing date August 23d, 1875, payable five years after date, and to secure the same to execute a mortgage on the real estate above described to Vorse, fraudulently representing to defendant in error that Vorse was advancing on said note and mortgage the full amount thereof; that plaintiff in error fraudulently represented to defendant in

error that he would procure the \$2,650, and out of that money pay and cause to be canceled the mortgage to Barker, and would surrender certain evidences of indebtedness that plaintiff in error held against defendant in error and one John Thomas, and would pay defendant in error the sum of \$1,000 in cash; but that after obtaining the mortgage and note he fraudulently delivered the same to Vorse in payment of \$2,650 of the indebtedness of plaintiff in error to Vorse, and did not pay to defendant in error the \$1,000 in cash, nor cancel the mortgage to Barker, nor surrender the evidences of indebtedness held against the defendant in error, but paid Barker the sum of \$785, and paid taxes on the land amounting to \$215, which was all that defendant in error received from plaintiff in error for the note and mortgage of \$2,650.

It is alleged that defendant in error was, at the time, poor, financially, and was himself unable to pay his incumbrance on the land, and by reason of the mortgage to Vorse so fraudulently obtained by plaintiff in error, he was prevented from borrowing money on the land, and that the same was lost to him by the foreclosure of the Barker and Vorse mortgages; that in addition to the loss of the real estate a judgment had been rendered against him for the sum of \$2,500 as a deficiency remaining after the sale of the mortgaged property; that the value of the real estate was \$8,000. It is also alleged that plaintiff in error has been absent from the state for more than five years, and that he has not been within the state four years since the date of obtaining the mortgage.

Plaintiff in error, by his answer, admits the execution of the mortgage to Vorse and the existence of the mortgage to Barker, as alleged in the petition, but denies that defendant in error applied to him for a loan of money for the purpose of paying off the Barker mortgage, but alleges that defendant in error and one John Thomas, his brother, were at the time of the execution of the Vorse

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mortgage indebted to him in the sum of \$1,650; that defendant in error well knew the plaintiff in error was indebted to Vorse, and that plaintiff in error applied to defendant in error and John Thomas, either to pay him the amount of their indebtedness or secure the same in such manner as to enable him to use it in paying a part of his indebtedness to Vorse, and it was mutually agreed between them that defendant in error should execute the mortgage on the real estate, as he did do; that \$1,000 in money should be paid to him for the purpose of reducing the liens thereon, and that they should be afterwards paid by defendant in error; that by the execution of the \$2,650 mortgage, defendant in error and John Thomas paid to plaintiff in error the said sum of \$1,650 due him from them, and received the benefit of \$1,000 paid upon his indebtedness to Barker, and the taxes due upon the land. All allegations of fraud or concealment are specifically denied. It is admitted that he did not surrender the evidences of indebtedness held by him against the defendant in error and John Thomas, but it is alleged that they have never paid any part of such indebtedness, and have suffered no damage by reason of his failure to surrender them. It is admitted that the Barker and Vorse mortgages were foreclosed, and the land sold as alleged in the petition of defendant in error, but it is alleged that he suffered no damage thereby, as he had sold and transferred the land prior to the commencement of the foreclosure proceedings, and had no interest therein. The absence of plaintiff in error from the state is denied, and it is alleged that from the time of the execution of the mortgage to Vorse until in April, 1881, plaintiff in error had continuously been a resident of the state of Nebraska and of the city of Omaha, and that while he was temporarily absent a part of the time, his home was in Omaha, where his family resided, and that during all the said time service of summons could have been made upon him as required by law in civil ac-

tions. It is alleged that since the date of the execution of the Vorse mortgage, certain proceedings in bankruptcy had been instituted in the district court of the United States, against plaintiff in error, which resulted in his discharge from all his indebtedness, and especially from the alleged indebtedness to defendant in error, on the 25th day of April, 1879.

Defendant in error, by his reply, denies the indebtedness of himself and John Thomas to plaintiff in error, in the sum of \$1,650, or any other amount, but alleges that plaintiff in error had held certain evidences of indebtedness of John Thomas, the amount of which is not known by defendant in error, but that at the time of said transaction plaintiff in error was not the owner thereof, but had transferred them to a *bona fide* purchaser for value, and that the said evidences of indebtedness were not surrendered either to defendant in error or John Thomas by plaintiff in error, but were still outstanding and subsisting evidences of debt against them; that at the time of the execution of the mortgage, plaintiff in error knew that he was not the owner and holder thereof, but had long prior thereto transferred the same. It is denied that the Vorse mortgage was executed for the purpose of securing any part of the said indebtedness. All knowledge of the indebtedness of plaintiff in error to Vorse at the time of the execution of the mortgage is denied, but it is alleged that the mortgage was executed to Vorse on the representation of plaintiff in error that Vorse would advance to plaintiff in error the full amount thereof. It is denied that the mortgage was given for the purpose of or with the intention of applying any part thereof on the indebtedness of the plaintiff in error to Vorse.

There was a jury trial, which resulted in a verdict in favor of defendant in error for the sum of \$3,229.80. A motion for a new trial was made and overruled, and judgment rendered on the verdict.

The first contention of plaintiff in error is, that the verdict is not supported by the testimony. Upon this part of the case it must be sufficient to say that we have carefully read all the evidence submitted to the trial jury, and find the same conflicting in almost every material feature of the case. If the testimony of plaintiff and his witnesses was correct, a verdict might well have been rendered in his favor; but if the testimony of defendant in error and his witnesses is the correct version of the case we cannot see that these facts would not support the verdict. Of this the trial jury was the sole judge, and, so far as their finding of fact is concerned, upon the testimony thus conflicting, it must be taken as final. The question that then presents itself is, will the facts as testified to by defendant in error and his witnesses, supported as they are by circumstances entitled to more or less weight, sustain the verdict?

This testimony may be briefly said to be, that prior to the execution of the Vorse mortgage, defendant in error, being unable to pay the Barker mortgage, applied to plaintiff in error for a loan of \$2,650, a part of which was to be applied to the payment of the Barker mortgage of \$1,200 and interest, and part to the payment of the note held by plaintiff in error against defendant in error and John Thomas, the remainder to be paid to defendant in money; that at the time plaintiff in error was indebted to Vorse in the sum of \$10,000 or upwards, but that he concealed the knowledge of this indebtedness from defendant in error and without his knowledge or consent applied the \$1,650 on its payment, promising to turn over the note of the Thomases for about \$900, but at the time he made this promise the note was in the bank pledged as collateral security for his indebtedness, and was not subject to his control; that soon after the mortgage was delivered to Vorse he received from Vorse for defendant in error \$1,000, which was applied upon the payment of the taxes and the Barker mortgage, promising defendant in error that

the remainder would be soon received and paid over to him. Defendant in error made frequent demands for the remainder of the money, but never received it. Upon the maturing of the first interest on this \$2,650 note, defendant in error received a letter from Vorse calling for its payment. He notified plaintiff in error of the fact, and proposed writing to Vorse directing him to retain the interest out of the \$1,650 not yet paid, and send him the balance. This, plaintiff in error requested him not to do, but simply to write that he would send the interest in a short time, promising that he would furnish the \$1,600, not yet received, but stating to defendant in error, in substance, that he did not desire Vorse to know that the money had not all been paid. About two years after the execution of the mortgage, when Thomas became satisfied he would never receive the \$1,650, plaintiff in error offered to turn over to him the indebtedness of himself and his brother, John Thomas, in the form of notes and accounts, which defendant in error finally agreed to take; but that these notes had also been transferred by plaintiff in error and were not subject to his control, and were never delivered. Soon after the execution of the mortgage, plaintiff in error instructed defendant in error to go to the bank and call for the note upon himself and John Thomas, which it had originally been agreed he should have, but upon calling for it at the bank, delivery was refused. He afterwards executed an order to defendant in error, in writing, which upon presentation was refused and the bank retained the note. Some of the notes were afterwards sued upon by the bank and judgments were rendered against the Thomases, and, although not paid, these judgments are unsatisfied and remain valid as against them.

It is true that upon the trial plaintiff in error stated upon the witness stand that he was ready to deliver over the note in accordance with his first agreement, which note was produced upon the trial for defendant in error,

but it was subsequently shown that this note was still the property of the bank, held by it as collateral security, and that plaintiff in error had no control over it and could not have delivered it to defendant in error had he consented to receive it.

If these facts were true, and of that the jury was the sole judge, it cannot be questioned that at the time that plaintiff in error promised to surrender the note for \$900 he well knew his inability to do so, and that he had no control over it. He must have known, and did know, that Vorse was only to pay the \$1,000 and apply the \$1,650 upon his own indebtedness. If he concealed from defendant in error the fact of this indebtedness and the intention of applying the \$1,650 thereon, and the further fact that the note which he agreed to surrender was not his property and that he could not surrender it, these facts would clearly establish fraud upon his part, and upon its discovery he would be liable to defendant in error for the damages sustained by reason of such fraud, which would be the \$1,650 and its interest.

The question of the measure of damages was properly decided by the trial court in its fifth instruction given to the jury, which was as follows: "You are instructed that the plaintiff having transferred to one Wiltsie all his right and title to the farm in question before the commencement of the foreclosure proceedings, plaintiff cannot recover damages for loss of title and interest in said farm by reason of said foreclosure proceedings;" and by the eighth instruction, which was as follows: "Should you be satisfied from the proofs there was a liability from defendant to plaintiff, created by the Vorse mortgage transaction, and that the same has not been satisfied, and that such liability was established by the fraud of defendant, and that the statute of limitation has not run, then you should allow plaintiff the amount of such claim against the defendant with interest at twelve per cent to March 3, 1880, from the date

of the Vorse mortgage transaction, and seven per cent from that date until the first day of this term."

By these instructions all questions of damage resulting from the loss of the farm are eliminated from the case and need not be further noticed.

The jury having found that the indebtedness was created by the fraudulent acts of plaintiff in error, we see no reason why the verdict should, on that account, be molested.

It is next insisted that the court erred in the admission of testimony tending to prove that after the execution of the Vorse mortgage, and prior to the foreclosure thereof, he made an effort to borrow money for the purpose of paying off the Vorse mortgage, but could not do so owing to the extent of the liens against it, and that by the foreclosure he lost the land. If there was error in the admission of this testimony it was clearly without prejudice, for the reason that this whole question was virtually withdrawn from the jury by the instruction numbered five, above quoted.

The next objection to the ruling of the court in the admission of testimony is; that the court erred in sustaining the objection of plaintiff in error to the following question: "At the time you made this transaction with Mr. Thomas did you in good faith intend to surrender the notes to him?" And again: "State whether or not at the time you made this transaction with the plaintiff you believed that you could, and intended to deliver the notes, to which you have referred, to Louis Thomas, in good faith?"

It is said by plaintiff that, "The gravamen of this action is the intent of Forbes to defraud Thomas, and that the right to recover rests upon the allegation in the petition that Forbes designed and contrived to defraud Thomas." While this is to some extent true, yet it could hardly be said that plaintiff in error intended otherwise than what would naturally result from his own acts. It would be a reproach upon his intelligence to say that if he concealed

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his indebtedness to Vorse, and applied the mortgage to the extent of \$1,650 upon its payment without the knowledge or consent of defendant in error, and also concealed the fact that the notes referred to in the testimony had been transferred by him, and could not be delivered, that he did not know, and in fact had not intended to comply with his contract; his good or bad faith must be decided by what he did and not by what he intended. It may be, and is, doubtless, true that in some instances the question as to intent, when propounded as the question was, would be proper and competent; but there is nothing in this case which would call for the answering of this question. If the jury believed from the testimony, as they doubtless did, that plaintiff in error had knowingly and intentionally made the representations which defendant in error says he made, and that they were false, then the question of intent must be answered from his actions and not from what he now says was his purpose.

The ruling of the court in the admission of certain mechanics' liens against the property of plaintiff in error is also assigned for error. It is quite difficult to see upon what theory these liens could be admitted. The witnesses for plaintiff in error testified that upon a certain occasion, in a certain brick house of plaintiff in error, a conversation was had between the parties to the action, by which it was agreed that the \$1,000 was all the money to which defendant in error was entitled from the Vorse mortgage. The mechanics' liens were introduced for the purpose of showing the construction of the house after the date of the alleged conversation. We can readily see how it would have been entirely competent to prove the fact sought to be established by the introduction of the liens, but it is difficult to see how the papers were competent to prove that fact. However, it seems to us that the testimony sought to be counteracted by the introduction of the liens was not material to the merits of the case for the reason

that if the conversation had occurred at the time and place as testified to by the witnesses for plaintiff in error, all that could be claimed for it would be that the Vorse note and mortgage were procured upon the promise of plaintiff in error to surrender notes against defendant in error, which he had no authority or power to do, the notes at that time being out of his hands. It could make no difference, therefore, whether the contract in that behalf was as claimed by plaintiff in error or as claimed by defendant in error. No prejudice could result to plaintiff in error by the introduction of the mechanics' liens, and if the decision of the court was even erroneous it would not call for the reversal of the judgment.

The next question presented by plaintiff in error is the alleged errors of the court in the instructions given to the jury, and those asked by plaintiff in error and refused. Plaintiff in error requested the court to give as his first instruction the following: "The jury are instructed that the claim for damages in this action, based on the foreclosure proceedings referred to in the amended petition, and the sale of the land therein described under the decree rendered in such foreclosure proceedings, cannot be sustained, and the jury will dismiss from their consideration the question of damages based on such claim."

This instruction was refused, and plaintiff in error excepted to the ruling of the court.

All that can be claimed for this instruction was given in instruction number five, upon the court's own motion, which we have hereinbefore copied, and need not reproduce it. Although couched in defendant's own language, the sum of both instructions is, that defendant in error could not recover damages for loss of his title to the farm by reason of the foreclosure proceedings. The verdict also shows that no such damages were given by the jury.

It is objected that the fifth instruction given by the court was defective because the reason assigned was the transfer,

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by Thomas, to Wiltsie of the title of the land. We cannot conceive that this would make any difference. The legal proposition given to the jury was, that the plaintiff in the action could not recover upon that branch of the case. "The character of the instruction will not be held erroneous because an improper reason for it is given." *Marion v. State*, 20 Neb., 233.

It is next contended that the claim of plaintiff in error is barred by the statute of limitations. Section 12 of the civil code provides that actions for relief on the ground of fraud may be commenced within four years after the discovery of the fraud. The transaction of which complaint is made occurred in 1875, and the suit was instituted in 1883—more than four years intervening. But it is alleged in the petition that plaintiff in error has been absent from the state for more than five years, and that he has not been within the state four years since the date of obtaining the note and mortgage out of which the claim of defendant in error arises. This allegation is denied by the answer, and it is alleged on the part of plaintiff in error that during all of the time from the date upon which the mortgage was made until in the year 1881, plaintiff in error and his family had their residence and domicile in the city of Omaha, and that during all of said time service of summons could have been made upon him in the manner provided by law.

Section 20 of the civil code provides that, "If when a cause of action accrues against a person he be out of the state, or shall have absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he come into the state, or while he is absconded or concealed; and if, after the cause of action accrues, he depart from the state, or abscond or conceal himself, the time of his absence or concealment shall not be computed as a part of the period within which the action must be brought."

Section 69 provides that, "Service shall be by delivering a copy of the summons to the defendant personally, or by leaving one at his usual place of residence at any time before the return day."

It appears from the evidence that in 1877 plaintiff in error changed his place of business from Nebraska to Dakota Territory—his principal place of business being in Deadwood. From that time until in the year 1881 his family remained in Omaha, living a part of the time in the residence property which was occupied by him and his family prior to his departure. In 1880 his wife went to Dakota, and remained with him four months. During the time of her absence the house was rented, and the tenant remained in it for some time after her return. During the time intervening between the departure of plaintiff in error in 1877 and the removal of his family in 1881, he was not in Omaha except for temporary purposes. He was frequently in Ogallala, in this state, for purpose of purchasing and driving cattle to Dakota, where he sold them. His business location was in that territory, and he was doing no business in Omaha. In 1881 his family joined him in Dakota, where they all remained until about the time of the commencement of this suit, when they all removed back to Omaha. It thus appears that plaintiff in error was absent from the state a great portion of the time, and from his family in Omaha substantially all of the time, until the final removal of his family to Dakota, where he was. These facts would lead to the conclusion that his "usual place residence" was not in Omaha. The words "usual place of residence" mean the place of abode. *Seymour v. Street*, 5 Neb., 85. We cannot see how it could be said, even upon the testimony of plaintiff in error, that his usual place of residence was in this state. The fact that his family remained in this state would not necessarily make it such, when it is not made to appear that during any of the time of his absence he had any intention to re-

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sume his residence in Omaha. See *Blodgett v. Utley*, 4 Neb., 25. But there was other testimony upon the question of residence which would sustain the verdict of the jury, even though the testimony of plaintiff in error and his witnesses had been different from what it was. James P. Haynes testified in substance that he was acquainted with plaintiff in error and his family, and that they moved to the Black Hills in 1878. George Thomas testified that he was acquainted with him, and that he knew him in Dakota in 1878, where he was engaged in the commission business in Deadwood, and that he had been there ever since, and had not lived in Omaha since that time to his knowledge. J. N. Phillips saw him in business in Deadwood in 1877 and 1878, and did not know of his returning to Omaha except occasionally. If the jury believed the testimony of these witnesses, this would sustain their verdict.

The last question presented is upon the refusal of the court to instruct the jury that the action was barred by the discharge of plaintiff in error under the proceedings in bankruptcy.

Plaintiff in error requested the following instruction, which the court refused to give: "The jury are instructed that the certificate of discharge in bankruptcy of the defendant Forbes, which was offered in evidence, covers the claim sued upon in this action, and that the defendant is thereby discharged from all liability to the plaintiff thereunder, and your verdict will therefore be for the defendant."

The provisions of the law of congress, commonly known as the bankrupt law, in force at the time of the alleged discharge and by which it is claimed by defendant in error that this action was excepted from the provisions of the discharge, is as follows: "No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy, but the

debt may be proved and a dividend thereon shall be a payment on account of such debt." Sec. 5117, Revised Statutes U. S., 1878.

It will be perceived that had the court given the instruction prayed for he would virtually have withdrawn from the jury the whole question of fraud, which he had no authority to do. The court did instruct the jury as follows: "If the claim of plaintiff was not created by the fraud of Forbes, practiced upon plaintiff, then plaintiff can recover no sum whatever, as in that case Mr. Forbes would be discharged from any liability by virtue of his discharge in bankruptcy; but on the contrary, if you shall be satisfied from the proofs that any claim which plaintiff may have against Forbes in the Vorse mortgage transaction was one based on the intentional fraud of Forbes upon Thomas, then plaintiff should recover, notwithstanding defendant's discharge as a bankrupt."

This instruction we think very properly submitted the question to the jury to be determined on their finding of the fact, and as to the fraudulent transaction of plaintiff in error. If he was guilty of no fraud the action was barred by the proceedings in bankruptcy. If the claim was created by fraud practiced upon defendant in error, it was not barred. Had the jury found there was no fraud they would have been required by this instruction of the court, to find for plaintiff in error. This submitted the whole question to them, and the instruction given was proper.

We find no error in the case which would call for a reversal of the judgment. It is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JOHN SCHAFFER, PLAINTIFF IN ERROR, V. THE STATE
OF NEBRASKA, DEFENDANT IN ERROR.

22	557
43	190

1. **Murder.** Intent or purpose to kill is essential to constitute the crime of murder in the first or second degree as defined by sections three and four of the criminal code, and this intent must be specifically and directly averred as part of the description of the offense in every indictment for either of those crimes.
2. ———: **AVERMENTS OF INDICTMENT.** An averment that the accused "feloniously, purposely, and of deliberate and premeditated malice" did make an assault on the deceased, and that he then and there "feloniously, purposely, and of his deliberate and premeditated malice did shoot" the deceased with a gun loaded, etc., inflicting a mortal wound, of which the deceased then and there instantly died, does not satisfy the requirements of the law; for though the accused may have purposely and of deliberate and premeditated malice assaulted the deceased and shot him, it does not follow that the shooting was with the design and purpose to produce death.
3. ———: ———. Where the purpose to kill is not averred by way of description of the offense, the omission cannot be aided by the ordinary formal conclusion of the indictment, which avers that "so" the jurors do find and say that the accused "did in manner and form aforesaid feloniously, purposely, and of his deliberate and premeditated malice kill and murder" the deceased. Such allegation being nothing more than a legal conclusion arising from the facts previously stated, cannot cure any defects in the premises on which it assumes to be predicated.
4. ———: **INSTRUCTION** numbered thirteen copied from instruction numbered nine in *Williams v. The State*, 6 Neb., 334, and printed therein at page 336, criticised, and the concluding words thereof held unnecessary.

ERROR to the district court for Kearney county. Tried below before GASLIN, J.

Greene & Hosteller and J. E. Shipman, for plaintiff in error, on thirteenth instruction, cited: *Runyan v. State*, 57 Ind., 80. *Frederick v. Ballard*, 16 Neb., 564. *Little*

Miami R. R. v. Wetmore, 19 Ohio State, 111. *State v. Howard*, 14 Kan., 173. Wharton Crim. Law, 9th Ed., Sec. 486. *Ballard v. State*, 19 Neb., 609. *Walters v. State*, 39 Ohio State, 216. *State v. Porter*, 34 Iowa, 131.

William Leese, Attorney General (J. L. McPheely, with him), for the state, cited: *Williams v. State*, 6 Neb., 336.

REESE, J.

Plaintiff in error was convicted of the crime of murder in the first degree, and sentenced to be hanged. He alleges error and brings the cause into this court for review. The indictment is as follows:

"THE STATE OF NEBRASKA, } ss.
KEARNEY COUNTY.

"Of the November term of the district court of the eighth judicial district of the state of Nebraska, within and for Kearney county, in said state, in the year of our Lord one thousand eight hundred and eighty-six, the grand jurors, chosen, selected, and sworn in and for the county of Kearney, aforesaid, in the name and by the authority of the state of Nebraska, upon their oaths, present: that John Schaffer, late of the county aforesaid, on the eighth day of November, in the year of our Lord one thousand eight hundred and eighty-six, in the county of Kearney and state of Nebraska, aforesaid, did feloniously, purposely, and of his deliberate and premeditated malice, make an assault on one William H. Smith, then and there being, and a certain gun which then and there was loaded with gunpowder and thirty leaden shot, and by him the said John Schaffer had and held in both his hands, he, the said John Schaffer, did then and there feloniously, purposeely, and of his deliberate and premeditated malice, shoot off and discharge at and upon the said William H. Smith, and thereby and by thus striking the said William H. Smith

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with the said thirty leaden shot, inflicting on and in the head of him, the said William H. Smith, one mortal wound, of which said mortal wound the said William H. Smith then and there instantly died. And so the grand jurors aforesaid, on their oaths aforesaid, do find and say that the said John Schaffer did in manner and form aforesaid feloniously, purposely, and of his deliberate and premeditated malice, kill and murder the said William H. Smith, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Nebraska." Signed by the district attorney.

The question here is, does this indictment charge the crime of murder in the first degree under the statutes of this state?

Section 3 of the criminal code is as follows: "If any person shall purposely, and of deliberate and premeditated malice, or in the perpetration, or attempt to perpetrate any rape, arson, robbery, or burglary, or by administering poison or causing the same to be done, kill another; or if any person by willful and corrupt perjury, or by subornation of the same, shall purposely procure the conviction of an innocent person; every person so offending shall be deemed guilty of murder in the first degree, and, upon conviction thereof, shall suffer death."

The provisions of this section, as applicable to the case at bar, are, that if any person shall purposely, and of deliberate and premeditated malice, kill another, every person so offending shall be deemed guilty of murder in the first degree, etc. The killing must be done purposely, and of deliberate and premeditated malice. That is, there must be an intent or purpose to kill at the time of the commission of the act, and the killing must be deliberately and premeditatedly done. This is the plain and obvious meaning of the statute. Applying this statute to the indictment, we find an entire want of any allegation of an intent or purpose to kill. It is alleged that the assault was purposely

made, and that the gun was purposely discharged, but with what intent or purpose these acts were done is nowhere alleged. The pleader has followed a precedent for an indictment for murder under the common law, and this would have been sufficient had not the legislature by the enactment of the section above quoted changed the essential ingredients or constituent elements of murder. At common law there were no degrees of murder, and there were but two degrees of felonious homicide. These were murder and manslaughter. By the statute we have two degrees of murder—the first and second—and manslaughter. At common law murder is defined to be the unlawful killing of any reasonable creature, in being and under the king's peace, with malice aforethought, either expressed or implied. 4 Bl. Com., 198.

In Russell on Crimes, 482, it is defined as the unlawful killing of a human being under the king's peace, with malice, premeditation, or aforethought, either express or implied by law. A purpose or design to kill is not an essential ingredient. But the rule of the common law has been changed, and the purpose, design, or intent to kill must now be alleged.

In Maxwell's Criminal Procedure, 176, it is said: "It is essential to the sufficiency of an indictment for murder in the first degree, under the statute, that it contain a direct and specific averment of the purpose or intention to kill, or intention to inflict a mortal wound, in the description of the crime."

This question was before the supreme court of Ohio in *Fouts v. The State*, 8 Ohio St., 98, in the year 1857, under a statute from which the section above quoted has since been copied, and it was there held by a majority of the court, in an indictment substantially like the one in this case, that it was essential to the sufficiency of an indictment for murder in the first degree that it contain a direct and specific averment of the purpose or intention to kill or in-

tention to inflict a mortal wound, in the description of the crime. So also in *Robbins v. The State*, Id., 131, where the accused was convicted of murder in the first degree by the administration of poison, it was held that the conviction could not be sustained where there was no allegation of the purpose or intent to kill the deceased.

In *Kain v. The State*, Id., 306, which was a conviction of murder in the second degree, by shooting, as in this case, and where the indictment was in all essential respects like the one in this case, the judgment was set aside owing to the want of an allegation of the purpose or intent to kill, it being held that such purpose was an essential element of the crime as defined by the statute.

In *Hagan v. The State*, 10 Id., 459, the same question was before the same court, and resulted in a like decision. We quote from the first and second points in the decision:

First. "Intent or purpose to kill is essential to constitute the crime of murder in the first or second degree as defined by the statutes of Ohio; and this intent must be specifically and directly averred as a part of the description of the offense in every indictment for either of these crimes."

Second. "An averment that the accused 'purposely and of deliberate and premeditated malice, did strike' the deceased, thereby inflicting a mortal wound, of which the deceased afterward died, does not satisfy the requirements of the law, for though the accused may have purposely and maliciously struck the deceased, it does not follow that the stroke was given with a design to produce death."

In *The State v. Brown*, 21 Kansas, 38, it was held that, "where an indictment for murder charged substantially that the defendant deliberately and premeditatedly committed an assault and battery upon the deceased by shooting him with a pistol loaded with gunpowder and leaden balls, and thereby inflicted a mortal wound, from which wound the deceased died, but did not anywhere charge that

the defendant committed the assault and battery, or did the shooting or killing with the deliberate and premeditated intention of killing deceased," it was held, under a statute similar to ours, that the indictment did not charge murder in the first degree.

The case of *Leonard v. The Territory of Washington*, 7 Pacific Reporter, 872, was where the plaintiff in error was indicted for the crime of murder in the first degree, and upon trial was found guilty as charged, and sentenced to be hanged. The section of the territorial statute under which he was prosecuted was as follows: "Every person who shall purposely and of deliberate and premeditated malice, or in the perpetration or attempt to perpetrate any rape, arson, robbery, or burglary, or by administering poison, or causing the same to be administered, kill another, every such person shall be deemed guilty of murder in the first degree," etc. The indictment was almost identical with the indictment in this case, so far as the charge of killing was concerned, it being alleged that the accused, "in and upon one Ambrose Patton, feloniously, purposely, and of deliberate and premeditated malice, did make an assault, and that the said Andrew Leonard, with a certain gun then and there loaded and charged with leaden bullets, then and there feloniously, purposely, and of deliberate and premeditated malice did discharge and shoot off, against and upon the said Ambrose Patton," etc., and it was held that the indictment was insufficient to sustain the conviction. See also *Fouts v. The State*, 4 G. Greene (Iowa), 500, and *State v. McCormick*, 27 Iowa, 402.

It may be suggested that the latter clause, or conclusion, of the indictment, "and so the grand jurors aforesaid, on their oaths aforesaid, do find and say," etc., brings the case within the rule here stated. This cannot be held to cure the defect, and it has been so decided in *Leonard v. The Territory*, *Hagan v. The State*, *Kain v. The State*, and *Fouts v. The State*, *supra*. See also Maxwell's Cr. Pr., 185. See also *Smith v. State*, 4 Neb., 277.

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Objection is made to instruction numbered thirteen, given by the court to the jury. This instruction need not be here set out at length, as it was copied from the ninth instruction given in *Williams v. The State*, 6 Neb., 334, and is there printed at page 336. While this instruction appears to have had the approval of this court in the very able opinion written in that case by Chief Justice Lake, yet it is apparent that it was not then before the court, and was only referred to by the writer of that opinion as a correct statement of the law giving the right to defend against threatened personal violence. I think the instruction is, perhaps, objectionable by reason of the words "if you are fully satisfied that he was fully excused or justified under the circumstances in taking the life of the deceased." As I read it, the instruction would be complete without those words, and their addition could only serve to unnecessarily impress upon the jury the fact that they must find that the accused "was fully excused or justified" in taking the life of the deceased. While it is possible that the error, if any, would not be so far prejudicial as to call for a reversal of the judgment, yet I think the words quoted might with safety and propriety be omitted.

Other objections to the judgment of the court below are presented, but as they will not likely arise upon the next trial they need not be here noticed.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

EDWIN S. DORSEY, BY DANIEL D. DORSEY, HIS NEXT FRIEND, PLAINTIFF IN ERROR, V. CYRUS R. CLAPP, DEFENDANT IN ERROR.

1. **Malicious Prosecution: DEFENSE: EVIDENCE.** In an action for malicious prosecution it was claimed by the defendant, who was a constable, that he had sufficient cause for making the complaint against plaintiff, charging him with the crime of burglary, his information being the confession of a youth whom he had previously arrested for the same crime, and which confession was voluntarily given, and by which he implicated plaintiff as being a confederate and accomplice; these facts being testified to by defendant. On his cross-examination he was asked if prior to the confession, and while the youth was in custody, he did not, in the hearing of the party under arrest, tell another constable to take him to jail and by the time he had laid there long enough he would confess, or language to that effect. Objection was made, and the objection sustained. *Held, Error.*
2. **Evidence: THE GENERAL REPUTATION** of a party to an action cannot be established by the proof of specific acts.

ERROR to the district court for Buffalo county. Tried below before MORRIS, J., sitting for HAMER, J.

Calkins & Pratt, for plaintiff in error, cited: Stephen's Evidence, Art. 56. 1 Greenleaf Ev., Sec. 55. 1 Best Ev., Sec. 261.

E. M. Cunningham, for defendant in error.

REESE, J.

This action was instituted in the district court of Buffalo county. The petition contained two causes of action. The first, for false imprisonment; the second, malicious prosecution.

The allegations of the second count in the petition are, in substance, that on the 8th day of October, 1884, de-

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defendant falsely and maliciously and without reasonable or probable cause therefor, charged this plaintiff before a justice of the peace of Buffalo county, with having, on or about the 8th day of October, 1884, in the county aforesaid, committed an offense of burglary and larceny, and thereupon caused the issuing of a warrant and arrest of the plaintiff; that such proceedings were thereafter had as resulted in an acquittal and discharge of plaintiff, and the prosecution was ended. The usual allegations of injury and damage and demand for judgment follow.

The defendant, in his answer, in substance admitted the arrest and conclusion of the prosecution, but alleged that at the time of the arrest he was a constable in the town of Kearney, Buffalo county, and that there was a burglary committed on the night of the 7th day of October, 1884, and on the 8th day of the same month, on due investigation, the defendant, with one Kavanaugh, was led to apprehend one Frank Dayton on the charge of committing said crime, and that Dayton, without any coercion or favor or promise of any reward whatever, made to the defendant and Kavanaugh a confession, wherein he said that he, in company with the plaintiff herein and one Jacob Cornelius, had broken into the store building at the time and in the manner charged. It is further alleged that the defendant submitted the facts stated by Dayton, impartially, fully, and freely to a respectable attorney, who advised defendant that the facts constituted sufficient cause for the arrest of plaintiff. It is denied that the complaint was made falsely, maliciously, and without probable cause.

The reply consisted of a denial of the allegations of new matter contained in the answer.

The trial was had, resulting in a verdict and judgment in favor of defendant. Plaintiff prosecutes error to this court.

Upon the trial plaintiff offered in evidence transcripts from a justice of the peace and county judge, showing that

a complaint had been made before a justice of the peace on the date alleged, charging the plaintiff with the crime of burglary and larceny; that he was arrested on said charge and detained in custody until the 10th day of said month, at which time the case was dismissed at the request of the prosecution, and plaintiff was discharged from custody.

Plaintiff also called as a witness his father, Daniel A. Dorsey, who testified as to the amount of money expended in procuring a discharge of plaintiff in error, and that previous to the filing of the complaint, plaintiff was employed in a store. Since such time he had been unable to again obtain employment. He also testified that upon the night of the alleged burglary plaintiff was at home, and that he had so informed defendant before defendant made the complaint.

Plaintiff was also called as a witness, and testified to the arrest and detention.

Plaintiff having rested his case, defendant was called as a witness in his own behalf. He testified, substantially, that on the 8th day of October, 1884, he was the constable, and that on that morning he received information that a burglary had been committed, and he, in connection with Mr. Kavanaugh, began an investigation of the matter; that in the afternoon he arrested one Frank Dayton, charging him with the crime, basing his arrest upon a pair of pants, supposed to be his, found in the store in which the burglary had occurred; that Dayton claimed the pants, which was a pair of overalls, and acknowledged his guilt, and stated that plaintiff and one Cornelius were with him and were parties in the crime. Upon his cross-examination he admitted that he saw the father of plaintiff before he made the complaint. The question was then asked him, "Did he not ask you not to go any further until he could prove to you that his son had nothing to do with it?" This question was objected to as immaterial and

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improper, and the objection was sustained by the court, to which plaintiff excepted.

We do not conceive the ruling of the court upon this question to have been a matter of very grave importance, as cases might arise in which an officer would not be justified in waiting to be advised that the person suspected was innocent, for fear of an escape. It is vaguely shown by the testimony that at that time he had plaintiff in custody. If this was true the question was a very proper one, as tending to show the animus of the officer's action. There was no danger of an escape, and if by making reasonable inquiry he could satisfy himself that there was no cause for the complaint, it would have been entirely proper for him to do so, and avoid the stain upon plaintiff's reputation caused by the filing of the complaint and prosecution thereunder.

The following question was then propounded to defendant: "Did you not, while the Dayton boy was still insisting he was innocent, say to Kavanaugh, in the boy's presence, 'Take him to jail, and by the time he has lain there long enough he will tell, I guess,' or something to that effect?" This question was objected to by defendant as immaterial, irrelevant, and incompetent, and the objection was sustained. In this we think the court erred. The question was material; it was relevant and competent. Defendant, by his answer, alleged that the confession was made without any coercion on his part. Dayton was a mere boy, and if the alleged confession was extorted from him by a threat to take him to jail and leave him there until he would confess, such threat would tend materially to disprove that such confession was voluntary, and would naturally require further investigation, where, by the confession, he implicated others. It was further shown by the transcript of the proceedings before the county judge that Dayton was acquitted upon his preliminary hearing, the finding being that there was not probable cause to believe

him guilty of the offense. He was therefore discharged. If Dayton was not guilty, his alleged confession, if made, was false. If false, it became material to ascertain in what manner it was obtained, not for the purpose of ascertaining whether his arrest was proper, but for the purpose of ascertaining the character of the information upon which defendant acted in making the charge against the plaintiff.

One Ren Julian was called as a witness, who testified that he had resided in Kearney for twelve years, and had known plaintiff since he was a very small boy. Certain questions were propounded to him, which with their answers we here copy :

Q. You may tell the jury at what hour of the day or night previous to the 8th day of October, 1884, you have seen Edwin S. Dorsey on the street, and in what company.

A. I have seen him at all hours of the day, and at all hours up to eleven o'clock at night.

Q. What was he doing as late as eleven o'clock at night, and what company was he in?

A. He was standing around the rink doors, in company with other boys.

Q. Was he saying anything?

A. He seemed to be the loudest-mouthed boy in the crowd. I have heard him swear louder and farther than any boy in town.

A Mr. McBirney testified to substantially the same thing.

These questions and answers were all objected to by plaintiff as immaterial, irrelevant, improper, and not about any issue in the pleadings, and attacking the witness for particular transactions, but not as to his general reputation. The objections were overruled and the witness testified as above shown.

Without discussing the question as to whether defendant might have introduced evidence against the plaintiff's general character, it is clear that he was not entitled to give in

evidence particular acts. It is well settled that character cannot be proven in this way. The general reputation of a party to an action may sometimes be investigated, and in this case, if proper at all, it would have been for the purpose of showing the good faith of defendant in making the complaint. General reputation when thus placed in issue may be supported by the party thus attacked by calling witnesses to prove the contrary of the statements of witnesses by which his reputation is attacked. It would be quite difficult to see what proof could have been made to rebut the impression created upon the minds of the jury by this testimony. It was said that he was seen at the rink with other boys. This might be true, and yet afford no proof of his bad reputation in connection with the violation of law. It is said also that he was profane—swearing louder than other boys. This might also be true, and yet be no proof of a disposition to violate the law by burglarizing other people's property. It is insisted by defendant that the testimony of this witness "would not weigh very much with the jury in a trial in this action, for it was not of a very material nature," and any prejudice it might have caused in the minds of the jury by its admission, was very materially reduced, if not wholly obliterated, by the refusal of the court to give to the jury the eighth instruction asked by defendant, and must therefore be a very feeble ground for the reversal of a judgment of this character and importance. The instruction referred was to the effect that if plaintiff, by his own action by keeping late hours and bad company, brought himself into bad repute and public scandal and infamy and disgrace, that would be a very material fact, which must reduce the amount of damages, if any were allowed to plaintiff. It may be first answered that the testimony was prejudicial, and no doubt it was an important factor, made use of by the jury in arriving at their verdict; and second, that it was admitted at the bar of this court that the attention of

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the jury was not called to the instructions named or to the refusal of the court to give it. It is quite clear, therefore, that the action of the court in refusing the instruction could have no effect whatever in repairing the injury done by the admission of the testimony.

For these errors the judgment of the district court must be reversed and the cause remanded for further proceedings, which is done.

REVERSED AND REMANDED.

THE other judges concur.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, 1888.*

22	571
26	212
22	571
25	346
22	571
26	724
22	571
27	51
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20	171

PRESENT:

HON. M. B. REESE, CHIEF JUSTICE.
 " AMASA COBB, } JUDGES.
 " SAMUEL MAXWELL, }

**LAWRENCE HOLLAND, PLAINTIFF IN ERROR, V. THE
 COMMERCIAL BANK OF WEEPING WATER, DE-
 FENDANT IN ERROR.**

1. **Evidence:** ARTICLES OF INCORPORATION OF BANKING CORPORATION. The written instrument presented in evidence by the plaintiff at the trial in the court below, as containing the articles of incorporation of the plaintiff in said action, though certified by the secretary of state as a copy, contained intrinsic evidence of being the original articles, the signatures thereto of the corporators being proved as genuine; *Held*, Admissible in evidence.
2. ———: BOOKS OF ACCOUNT. On the trial of the action plaintiff's books of accounts were introduced in evidence, and it was

* NOTE.—Decisions herein published as of this term are cases argued and taken under advisement at July term, 1887, and filed prior to January 5, 1888, when, under the constitution, Judge Reese became Chief Justice.—REF.

shown that a greater number of the entries at specified dates were made by and in the handwriting of a clerk in plaintiff's employ, who was neither called nor subpoenaed to verify such entries, nor was his absence accounted for; *Held*, Error, and a new trial granted.

3. **Attachment: MOTION TO DISCHARGE: EVIDENCE.** On the trial of a motion to discharge an order of attachment to a judge at chambers, there being evidence tending to prove the absconding of defendant with intent to defraud his creditors, and that he had left the county of his residence to avoid the service of a summons, the same being grounds of attachment alleged in the affidavit for attachment, and the weight of the evidence not being clearly against the finding and judgment of the judge on said motion, the same *Upheld*.

THIS was an action commenced in the Cass county district court June 19, 1886, by the Commercial Bank of Weeping Water against Lawrence Holland and Tewksbury & Cooper, to recover the sum of \$7,474.17, made up as follows: Balance upon a \$4,000 note—\$2,474.17. One note of \$3,000, given by Holland to Tewksbury & Cooper and by them indorsed to the bank. Overdraft on defendant's bank account, \$2,000. Tewksbury & Cooper demurred to the petition, and the same being sustained, by leave of court an amended petition was filed against Holland alone for the same amount, viz., \$7,474.17. When the action was commenced an order of attachment was issued on grounds set forth in the opinion, and a motion to discharge it made before POUND, J., was denied. The answer of defendant Holland denied, *First*, The corporate existence of plaintiff. *Second*, Admits execution of notes sued on, admits payment on one of said notes the sum of \$1,535.83. As a third defense, averred that plaintiff held two mortgages, executed by defendant and wife on certain real estate, which were given to secure payment of two notes, one for \$2,000 and one for \$4,000, the last named note being one of the notes sued on in this action; and that in consideration that the debt of \$6,000, less the credit of \$1,535.83, as evidenced by said two notes, and secured by

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said mortgages, should be satisfied, paid, and canceled, and as a further consideration that plaintiff should pay to defendant, or give defendant credit on any debt found to be due from defendant to plaintiff, the sum of \$1,500, the defendant bargained and sold to the plaintiff the real estate in said mortgages described, and defendant and wife executed good and sufficient deeds to said property. And as a fourth defense, defendant averred that, in consideration that plaintiff pay defendant or give defendant credit on any debt found to be due plaintiff from defendant, the sum of \$1,000, the defendant bargained and sold to plaintiff certain described real estate and gave good and sufficient deeds therefor. And as a fifth defense, averred that, in consideration of the sum of \$1,055, he sold to plaintiff certain valuable paid-up corn contracts, for which he was to receive credit on the debt sued for in this action the sum of \$1,055. And as a sixth defense, averred that, in consideration of the premises as above set forth, defendant has more than paid plaintiff all of the indebtedness claimed to be due it, etc., and after allowing all claims and demands due, plaintiff became indebted to defendant in the sum of \$2,081. And as a seventh defense, averred that \$2,000 of the pretended consideration for said note of \$4,000 was money advanced by plaintiff as a "marginal" contract or deposit, and it was then and there expressly agreed that the same should be invested in name of defendant in grain options, and if the market went in favor of defendant and he made a profit thereby, then the plaintiff was to receive part of said profit, not to exceed \$100, for the use of the money so invested; that in said transaction said \$2,000 was so gambled, squandered, and lost, and so much of said note defendant received no consideration therefor. With prayer for judgment against plaintiff for \$2,081 and costs of suit.

The reply to the above answer was a general denial. Upon trial before HAYWARD, J., and a jury, there was a

a verdict in favor of the bank for \$5,962.17; motion for new trial was overruled and judgment was entered on verdict; to reverse which, Holland came up on a petition in error.

J. H. Haldeman and *Charles O. Whedon*, for plaintiff in error, on admission of articles of incorporation, cited: Comp. Stat., Sec. 13, Ch. 73. *Oliver v. Persons*, 30 Ga., 391. *Hanson v. Armstrong*, 22 Ill., 442. *Carr v. Carr*, 36 Mo., 408. Books of account. Code Sec. 346. Attachment proceedings. *Robinson v. Burton*, 5 Kan., 294. *Steele v. Dodd*, 14 Neb., 496. *Hunter v. Soward*, 15 Neb., 215. *Young v. Cooper*, 12 Neb., 610.

H. D. Travis and *E. H. Wooley*, for defendant in error, on attachment proceedings, cited: Code, Sec. 199. Maxwell's Pl. and Pr., 230. *Young v. Nelson*, 25 Ill., 566. *Morgan v. Avery*, 7 Barb., 664. *North v. McDonald*, 1 Biss., 57. Waples on Attachment, p. 80.

COBB, J.

The first point upon which plaintiff in error claims a reversal of the judgment is the alleged failure of the plaintiff in the court below to prove and establish its corporate existence on the trial, such corporate existence having been denied and put in issue by the answer.

The paper purporting to contain the articles of incorporation, as it appears in the bill of exceptions, is evidently a copy and not an original paper, and yet there is intrinsic evidence to be gathered from the bill of exceptions that the original paper was offered and admitted in evidence. It appears that at the commencement of the trial the plaintiff offered in evidence the records of the incorporation of the bank. "The defendant objects to the introduction of this paper, for the reason that there is no foundation laid for it, and it is therefore incompetent." The offer was tem-

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porarily withdrawn. C. H. Parmele was then sworn as a witness for the plaintiff, and upon his examination testified to the genuineness of *five* of the signatures to the paper. J. M. Robinson was then introduced as a witness, also on the part of the plaintiff, and upon his examination verified the remaining signatures. The plaintiff then renewed its offer of the records of the incorporation of the bank. The defendant objected, "as no foundation laid, and incompetent." The court overruled the objection. The paper, as it appears in the bill of exceptions as plaintiff's exhibit "A," is type-written, in the same type as the body of the bill of exceptions, as well the body of the articles of incorporation, as the signatures of the incorporators, the endorsement of its filing by the county clerk, two certificates of acknowledgment by notaries public, and a certificate by the secretary of state. In this latter certificate the secretary of state certifies that the same is a true and perfect *copy* of the original articles of incorporation on file in his office. It is impossible to conceive that this is the identical piece of paper which was before the said witnesses, the signatures to which they swore to be in the "genuine handwriting" of the corporators, and which upon evidence was admitted by the court. The paper admitted was not objected to, as a copy, and not an original paper, and yet it cannot be denied that the language of the objection was broad enough to admit of a construction covering that point.

If the paper as now found in the bill of exceptions is the identical paper that was offered and given in evidence, the court erred in overruling defendant's objection to its admission. If on the other hand, it was substituted in making up the bill of exceptions, for the one actually given in evidence, without a stipulation or leave of the court, then it evidences a degree of carelessness in practice which ought not to be indulged in. Further on in the bill of exceptions this circumstance is repeated. The defendant

swears that certain deeds offered in evidence by him are in the handwriting of Mr. Wooley, that he saw him write them; yet the deeds appear in the bill of exceptions in the ordinary type-writing, evidently copies, but nowhere called copies. It turns out, however, that the question thus involved is not of great importance in the case. The action was founded in part upon a promissory note executed and delivered to the plaintiff by its corporate name. In such case it has been held unnecessary to prove the corporate existence of the bank, in a suit by it on such note, and such is the law as stated in the last clause of section 144 of chapter 16, Comp. Stat. See, also, *Cowan v. The State*, in this court, a recent opinion, *ante* p. 519, and cases there cited.

The second point of contention in the brief is upon the admission in evidence of the cash book of defendant bank. The evidence applicable to that matter is as follows, J. M. Roberts, a witness on behalf of the plaintiff, being on his examination-in-chief, and having testified that he was the cashier of the plaintiff:

Q. I will ask you what book this is?

A. The ledger.

Q. Is that account in your handwriting?

A. Yes, sir.

* * * * *

Q. What book is that you have?

A. Cash book.

Q. Is that your original entry book?

A. Yes, sir.

Q. Please turn to it, on February 19, 1886, and state whether there appears upon that book any entry in favor of or against Lawrence Holland?

A. Yes, sir. Both \$69.33 debit and \$150 credit.

Q. Turn to the 20th day of February, 1886. Do you find any entry there for or against Lawrence Holland, the defendant?

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A. I find two entries against the defendant.

Q. Is that your book of original entries?

A. Yes, sir.

Q. Does it show continuous transactions between you and the defendant and the bank and other parties?

A. Yes, sir.

Q. Was it kept by yourself?

A. Yes, sir.

Q. I wish you would read those entries?

The defendant objects, as no foundation laid, and immaterial. Overruled.

A. L. Holland, there is a debit of \$100. L. F. Holland, there is a debit of \$34.20.

Q. Turn to the 22d of February, 1886. [The plaintiff offers in evidence the line on this page, 173, upon which appears the figures, 373, in red ink, being the second time such figures appear upon said page.] State to the jury the amount?

Court. It is against the defendant, is it?

A. Yes, sir, it is \$13.70. All we have been reading yet are debits.

This examination was continued at great length, without further objection. Witness was cross-examined by defendant, re-examined by plaintiff, and re-cross-examined by defendant. I quote:

Q. Do you say that you kept the books there that you have testified to, here, yourself, that they are in your handwriting?

A. Not clear up to date.

Q. Up to the 19th of June were all the entries in your handwriting?

A. No, sir.

Q. In whose?

A. Part of them in Mr. Smith's.

Q. What part of them?

A. I can't tell without looking?

Q. Did you not testify when the book was introduced that the books were in your handwriting.

A. I testified up to the 18th of February, and after that some time.

Q. How long after that time?

A. Somewhere in March, somewhere about the middle, I think.

Q. And the others are not in your handwriting?

A. Part are, and part are not.

* * * * *

Q. There are about two-thirds of them that are not in your handwriting?

A. I can't say as to the amount.

Q. What would be your best judgment?

A. I usually call the checks over, and he writes them down.

Q. About how many were in your handwriting?

A. I can't say.

Q. Were those in your handwriting entered upon the book in the first instance?

A. Yes, sir.

* * * * *

Q. Just look at these items and state whether that is in your handwriting, on page 248, in red ink, 367, cash book?

A. No, sir. That is in Mr. Smith's.

Q. Do you see entries there in your handwriting?

A. That day Mr. Smith wrote up all.

Q. And you do not know whether that is correct or not?

A. I do.

The plaintiff here rested its case.

Defendant moved to strike out that portion of the book that is not in the handwriting of the witness, on the ground that there is no foundation laid. Overruled.

The provision of the statute governing the introduction of books of account in evidence is as follows:

"First. The books must show a continuous dealing with persons generally, or several items of charges at different times, against the other party, in the same book.

"Second. It must be shown, by the party's oath, or otherwise, that they are his books of original entries.

"Third. It must be shown, in like manner, that the charges are made at or near the time of the transaction therein entered, unless satisfactory reasons appear for not making such proof.

"Fourth. The charges must also be verified by the party or the clerk who made the entries, to the effect that they believed them just and true, or a sufficient reason must be given why the verification is not made." Civil Code, Sec. 346.

It appears from the above testimony that the first, second, and third clauses of the above section of the statute governing the production of account books in evidence, were substantially complied with; but not so of the fourth clause. It appears that many of the entries of charges introduced were not in the handwriting of the witness, but in that of Mr. Smith. The latter was not produced as a witness, nor was there any reason given for not producing him. It would seem that he was a clerk, or teller, in the employment of the plaintiff at the time of making these entries, and he will be presumed still to be, or at least to be within the reach of a subpoena, until the contrary is shown. I understand the meaning of the statute to be that in cases where the party himself made the entries he shall verify them to the effect that he believes them just and true, and where the entries are made by a clerk who is still living and within the reach of a subpoena, he must be produced and the entries verified by him. Here the entries were not verified in the manner nor to the effect required by statute by any one. This applies even to the entries made by the cashier, who was sworn as a witness. The testimony of the witness, as to the handwriting of Smith, was

inadmissible for the purpose of proving the book accounts, without first laying a foundation for such evidence by proving his death or absence.

Having come to the conclusion that there must be a new trial for error in the admission of the books of the plaintiff without their being verified according to the statute, the remaining assignments as applicable to the trial of the issues before the district court will not be considered.

The seventeenth, eighteenth, and nineteenth errors assigned are based upon the proceedings before Hon. S. B. Pound, district judge, at chambers, on the motion of the defendant to discharge the attachment and in overruling said motion.

The seventeenth assignment, being the first under this head, is directed to the form of the affidavit for the order of attachment. Plaintiff in error in the brief says: "There are three claims and causes of action set forth, and the affidavit does not state that each of these claims are just," etc.

Section 199 of the civil code provides that, "An order of attachment shall be made by the clerk of the court *

* * * when there is filed in his office an affidavit of the plaintiff, his agent, or attorney, showing: *First*, The nature of the plaintiff's claim. *Second*, That it is just. *Third*, The amount which the affiant believes the plaintiff ought to recover. *Fourth*, The existence of some one of the grounds for an attachment enumerated in the preceding section."

The affidavit, after reciting the commencement of the action by the plaintiff against the defendant in the district court of Cass county, proceeds—"to recover the sum of \$7,474.17 now due and payable to the plaintiff from defendant upon one promissory note for \$4,000, dated February 18, 1886, on which there is a balance now due of \$2,474.17, signed by Lawrence Holland and made and delivered to the said plaintiff; also \$2,000 money advanced to defendant at his instance and request by plaintiff; also

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\$3,000 on note dated August 31, 1885, to Tewksbury & Cooper, and by them endorsed and transferred to plaintiff herein. Affiant further says that said claim is just, and that the plaintiff ought, as he believes, to recover thereon the sum of \$7,474.17," etc.

I think this affidavit a sufficient compliance with the statute. The word *claim*, as used by the affiant, clearly refers to the entire claim of seven thousand four hundred seventy-four dollars and seventeen cents, and although as a matter of description he afterwards separates the claim into several parts, it was not, in my opinion, necessary that he should declare his belief in the justness of each subdivision or item of the claim.

But the chief ground of contention, as against the action of the court at chambers in overruling defendant's motion to quash the attachment, is the untruth of the affidavit upon which the order of attachment was issued. The allegations of the affidavit to which attention is thus directed are as follows: "And that the defendant, Lawrence Holland, has absconded with intent to defraud his creditors. Affiant further says that he has left the country to avoid the service of a summons, and that he so conceals himself that a summons cannot be served upon him. Affiant further says that defendant has property or rights in action which he conceals, and that he is about to convert a part of his property into money for the purpose of placing it beyond the reach of his creditors," etc. In support and resistance of the motion there were produced and read to the judge, at the hearing, forty-two affidavits, many of them quite lengthy, besides several voluminous official records and certificates. These papers are contained in one of the bills of exceptions, where they are placed without regard to order or sequence. The time at my command is not sufficient to enable me to make that exhaustive examination and study of these papers which I would wish, or which doubtless was made by the judge (who decided the question) on the motion at chambers.

The plaintiff bank is situated and doing business at Weeping Water, Cass county, at which place the defendant resides. The said affidavits tend to prove that for a year or more previous and up to about the 12th day of June, 1886, the defendant was engaged in buying and shipping grain, shipping and selling lumber, at Weeping Water and other points, and dealing in *options* on the grain market of St. Louis; that he had a contract with a firm at Chicago by which they were to advance him 15 cents per bushel on all corn bought and held by him. He had become largely indebted to the plaintiff on notes and overdraft, and involved in large litigation at St. Louis, besides other financial complications. About this time the Chicago firm withdrew the contract by which they were to make advances on corn, and the defendant found himself greatly embarrassed for the want of funds to carry on his business, as well as to meet the pressing demands of the plaintiff. At this time he represented to the cashier of the plaintiff that by his going to the village of Friend, where he had formerly resided, which place is situated some fifty or sixty miles west of Weeping Water, he could, as he believed, obtain money or security to meet his pressing wants, and with the concurrence of said cashier he left his home with the avowed purpose of going to said village of Friend on the said business; that defendant left Weeping Water for the purpose aforesaid, on the 14th day of June, giving out that he would be absent not to exceed two days. On the same day, the 14th, he wrote from Friend to the cashier of the plaintiff, at Weeping Water, that he would not be at home until Thursday evening, which would be the 17th day of the month; that he must go out in the country for a day or two; that he might go down Wednesday noon, but could not tell yet, but when he did get down he thought he would be in shape to help him out in cash; that defendant did not return to Weeping Water until the 25th day of June, after the suit was commenced and the attachment

sued out; neither did he write to, nor hold any communication with, the plaintiff (after the said letter) or its cashier or any officer or person connected with it. Also, that early in the morning of the 19th of June, the wife of defendant, who had, up to that time, remained at their home at Weeping Water, left their said home taking her trunk and took the train for Omaha and the East, after having, the evening before, admitted to the cashier of the plaintiff that she had just received a letter from the defendant and that he had left the village of Friend, but refused to tell him where he had gone, or at what place he had written said letter to her.

These facts are all sworn to, positively, and nearly all of them are uncontradicted. But it matters not if they were contradicted, for the purposes of a reviewing court. The question, as I understand it, is, had the trial judge evidence before him to justify him in making the decision which he made? If he had, such decision must be sustained by this court, although such evidence was contradicted by other evidence in every particular, or explained away to such an extent as to lead us to the conclusion that were it presented to us as an original question, we would decide it differently, unless the preponderance of evidence against the decision is clear and manifest. Such was the holding of this court in the case of *Mayer & Schurmann v. Zingre*, 18 Neb., 458. But, on the contrary, while the defendant in his affidavit explains where he was during this time—that on Wednesday, the 16th, he started for Weeping Water expecting to get there that night, or next day; that he went by way of Omaha, where he had some business to look after; that while there he learned that “he could get to Chicago on cut rates, which was \$3 for the trip, and having before this contemplated visiting Chicago and Detroit, with his wife, who was rather sickly and needed recreation, he wrote her at Weeping Water, from Omaha, that he would go on to Detroit while

the rates were low, and that his wife should follow as soon as convenient, but in time if possible to get reduced rates. He was informed that rates might be reinstated at any time, hence his sudden departure for Detroit. While in Detroit, but a short time, waiting for his wife, on the 24th of June, 1886, he received a letter from her stating that said plaintiff had commenced this action, and that attachments were being placed on his property, and that his presence was needed at once," etc. Yet, I am not prepared to say that the judge was obliged to accept this explanation as true, or satisfactory; or that he had not evidence before him to sustain the charge of absconding with intent to defraud his creditors, or of having left the county of his residence to avoid the service of a summons.

There was also evidence tending to prove the other grounds of attachment charged in the affidavit for attachment, but which it is deemed unnecessary to review.

The finding, ruling, and order of the district judge, at chambers, in overruling the motion and application of the defendant to quash, dissolve, and discharge the attachment, is affirmed. And the judgment of the district court is reversed, with costs in this court, the costs of the district court to abide the result of a new trial, and the cause remanded to the district court for further proceedings in accordance with law.

JUDGMENT ACCORDINGLY.

THE other judges concur.

LAWRENCE HOLLAND, PLAINTIFF IN ERROR, V. COMMERCIAL BANK, OF WEEPING WATER, NEBRASKA, JOHN HOLLAND, AND MARTIN HOLLAND, DEFENDANTS IN ERROR.

1. **Parties: RIGHTS OF INTERVENOR.** Defendant in error bank commenced its action in the district court of Saline county against defendants in error Holland, upon a promissory note, executed by said Hollands to plaintiff in error, and by him alleged to have been endorsed to the bank. Plaintiff in error appeared and presented his answer, by which he denied the ownership of the notes by the bank, and alleged that he was the owner thereof and entitled to the proceeds of any judgment rendered thereon. He also filed his application to be admitted as a party to the action. The application was refused, and he was not permitted to file his answer. *Held*, Error.
2. **Plea in Abatement: WAIVER OF ERROR.** At that time an action was pending in the district court of Cass county, instituted against him by defendant bank. After having been denied the right to intervene in the case pending in Saline county, he filed his answer in the district court of Cass county, in the cause therein pending, wherein he charged the bank with the conversion of the note upon which the suit had been brought in Saline county, and demanded judgment for the amount thereof, and which action is now pending. *Held*, A waiver of the error of the district court of Saline county, and an abandonment of his right to prosecute error thereon in the supreme court.

ERROR to the district court for Saline county. Tried below before MORRIS, J.

J. H. Haldeman, for plaintiff in error, cited : Code, Sec. 41. *Harman v. Barhydt*, 20 Neb., 630. *Pomeroy Remedies*, Secs. 425, 429, 430.

H. D. Travis, for defendant in error.

REESE, J.

On the 12th day of February, 1887, defendant bank commenced its action in the district court of Saline county

against John Holland and Martin Holland, upon a promissory note for \$1,257.20 made by said John and Martin Holland to Lawrence Holland, and which said note it was alleged had been endorsed to the bank by Lawrence Holland.

John Holland and Martin Holland filed an answer denying the indebtedness and denying that the bank was the owner of the note.

Lawrence Holland, plaintiff in error here, made application to the court to be made a party to the action, and alleged that he was then the owner of the note, entitled to the proceeds thereof, and that the bank had no interest therein. The application to be made a party defendant was overruled, and he now prosecutes error thereon to this court. Pending the proceedings in error here, defendant in error bank filed an answer to the petition in error, in the form of a plea in abatement, by which it is made to appear that after the ruling of the district court upon the application of plaintiff in error, he had appeared in the district court of Cass county, wherein an action was pending against him by defendant bank, and by leave of court filed his answer alleging his ownership of the note in question and the conversion thereof by the bank, by which he was damaged the full amount of the principal and interest thereon.

The question then presented is, was the filing of his answer in the district court of Cass county, setting up the conversion of the note in question and demanding judgment for the amount thereof, an abandonment of his proceedings in error here? Under the circumstances plaintiff evidently had the right to select his own forum in which to litigate the question of his ownership of the note. He had the right to intervene in the case pending in Saline county and assert his title to the property and his right to the proceeds. This right is clearly given under sections 41 and 50a of the civil code. Or he had the right at his option to charge the bank with conversion of the note by way of answer in

It follows that the petition in error must be dismissed, which is done.

THE other judges concur.

1. **Sale: PURCHASE OF PROPERTY BY AGENT: DECLARATIONS OF VENDOR: EVIDENCE.** The evidence tends to prove that the plaintiff purchased one-half interest in the property in litigation, at a certain date, he then being in possession as agent, and continued in possession until a subsequent date, when he purchased the remaining one-half interest. The question being the *bona fides* of both of said purchases and sales: *Held*, That the declarations of the vendor as to his interest in, and ownership of, said property, made after said first purchase and sale, but before

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28	782
29	80
22	567
28	782
22	567
30	821
22	567
40	956
140	278
41	98
22	567
48	187
43	410
22	567
45	838
22	567
50	275
52	76

the last one, were admissible in evidence for the purpose of impeaching the plaintiff's title, but that such declarations made after the last purchase and sale were inadmissible.

2. **Fraud: EVIDENCE OF INTENT.** On an issue of fact as to whether an assignment or transfer of property was made to hinder, delay, or defraud creditors, it is competent, where the assignor, or vendor, is a witness, to enquire of him whether in making the assignment or transfer he intended to delay or defraud his creditors. See *Scymore v. Wilson*, 14 N. Y., 567.
3. ——— : ———. The same rule applies to cases when the assignee or purchaser is called as a witness.
4. **Evidence: BOOKS OF ACCOUNT.** On the trial defendants cross-examined the plaintiff as to certain erasures in his account books and a leaf of one of them which appeared to have been torn out; he answered that the erasures had been made by himself to correct errors, and the leaf torn out also by himself, because it had been accidentally soiled and rendered unfit for use; defendants afterwards offered said book in evidence, which offer was refused. *Held*, No error.
5. **Evidence: WITNESSES.** When upon the examination or cross-examination of a witness a certain conversation is drawn from him in evidence, the opposite party will always be permitted to cross-examine, or re-examine him for the purpose of eliciting the whole of such conversation. The scope of such examination is a question peculiarly for the trial court.
6. ——— : ———. The plaintiff being a witness in his own behalf was cross-examined as to the source from which he derived the money used in the purchase of the property in litigation, and having answered that a certain portion of it had been received by him in payment of a loan previously made to his father, an attempt being made, as well in his further cross-examination as otherwise, to discredit his statement in this behalf, he was permitted to testify in rebuttal as to where he obtained the funds out of which said loan was made. *Held*, No error.
7. **Instructions to Jury.** The instructions given to a jury must be construed together, and if when considered as a whole they properly state the law, it is sufficient. *Bartling v. Behrends*, 20 Neb., 211.
8. ———. When the law applicable to the pleadings and evidence in a case, has already been fully given by instructions to a jury by the court on its own motion, it is not error to refuse further instructions.

9. **New Trial.** Where, upon a motion for a new trial founded on affidavits, all of the material facts contained in such affidavits are contradicted by affidavits in resistance, the judgment of the trial court denying such motion will ordinarily be upheld.
10. ———. A new trial will not be granted on account of newly discovered evidence merely cumulative in its character.

ERROR to the district court for Sarpy county. Tried below before WAKELEY, J.

H. D. Travis and *E. H. Wooley*, for plaintiff in error, on admissibility in evidence of declarations of vendor, cited: *Carney v. Carney*, 7 Baxter, 284. *Riehl v. Evansville Foundry Assn.*, 3 N. E. Rep., 633. *Hunsinger v. Hoffer*, 11 Id., 463. Testimony of assignor as to his intention to defraud, inadmissible. *Monteith v. Bax*, 4 Neb., 166. Sixth instruction asked for by plaintiff below should not have been given. *Bump Fraudulent Conveyances* (3 Ed.), 208. Fifth instruction given by the court is misleading. *City of Crete v. Childs*, 11 Neb., 252. *Harrison v. Baker*, 15 Id., 47. Third instruction given on behalf of plaintiff below is too broad. *Becker v. Koch*, 10 N. E. Rep., 701. Jury should have been instructed as to the issues. *Tipton v. Triplett*, 1 Metc. (Ky.), 570. *Dassler v. Wisley*, 32 Mo., 498. Sixth instruction asked for by us should have been given. *Pryor v. Coggin*, 17 Ga., 444. *Ratcliff v. Trimble*, 12 B. Mon., 32. And in support of 20th instruction, see *Newman v. Cardell*, 43 Barb., 448. *Smith v. Brown*, 34 Mich., 455. New trial should have been granted on account of misconduct of jury. *Thompson & Merriam on Juries*, Secs. 438 and 432. *Cole v. Swan*, 4 Green (Ia.), 32. *People v. Knapp*, 3 N. W. R., 927. And on account of newly discovered evidence. *Simmons v. Fay*, 1 E. D. Smith, 107.

J. H. Haldeman and *Charles O. Whedon*, for defendants in error. Declarations of vendor inadmissible.

Miner v. Phillips, 42 Ill., 123. *Schebel v. Jordan*, 30 Kan., 354. Evidence of assignor's intent admissible. *Starin v. Kelley*, 88 N. Y., 422. Bump on Fraud, 593. Account books inadmissible. *Masters v. Marsh*, 19 Neb., 458. On misconduct of jury, cited: *Hodges v. Bales*, 102 Ind., 494. *Epps v. State*, Id., 539. *Johnson v. Greim*, 17 Neb., 448. *Polin v. State*, 14 Id., 549.

COBB, J.

This was an action in the district court of Sarpy county, by Martin B. Holland against Artemas W. Campbell, sheriff of Sarpy county, and the sureties on his official bond, for levying on, seizing, taking, and carrying away, by the said sheriff, under an order of attachment issued to him out of the district court of Cass county, in an action therein pending, wherein the Commercial Bank of Weeping Water was plaintiff and Lawrence Holland and others were defendants, of a certain stock of lumber and building materials alleged to be the property of said Martin Holland, and in his possession.

Campbell, the principal defendant, answered, setting up the said order of attachment, alleging that the property set out and described in the plaintiff's petition was then and there the property, goods, and chattels of Lawrence Holland, defendant in said order of attachment, and justifying the taking of said property under and by virtue of said order; also alleging that at the time of said levy the said Martin B. Holland was present and made no objection to said levy being made, and made no claim whatever, as owner or otherwise, to said property, or any part thereof, so as aforesaid levied upon. Also that said property levied on as aforesaid was at the time of said levy the property of said Lawrence Holland, and was not the property of the said Martin Holland, at that time, nor ever was the property of said Martin Holland. Also that whatever pretended

claim, title, or ownership that the said plaintiff now asserts or claims to have in said property was derived from the said Lawrence Holland, and that said pretended title was conveyed by said Lawrence Holland to said Martin Holland, without consideration, and for the purpose of defrauding the creditors of the said Lawrence Holland, and especially the Commercial Bank of Weeping Water, in whose favor the said order of attachment was issued; that said Lawrence Holland and said Martin B. Holland are brothers, and that said pretended transfer of said property was made from Lawrence Holland to Martin B. Holland by collusion between said brothers, for the purpose of defrauding the creditors of said Lawrence Holland, and that the said Martin B. Holland has, in truth and in fact, no title, ownership, or interest in said property, but that the same was, at the time of said levy, and, for a long time prior thereto had been, the property of said Lawrence Holland, etc.

There was a trial to a jury, with a verdict and judgment for the plaintiff. The cause is brought to this court on error by the defendants, who assign the following:

"*First.* The court erred in excluding from the jury the testimony of J. S. Tewksbury and J. M. Roberts, in regard to conversations had by them with Lawrence Holland about the lumber yard in controversy, subsequent to the 19th day of April, 1886.

"*Second.* The court erred in admitting in evidence the testimony of Lawrence Holland that the sale from himself to his brother was an actual *bona fide* sale.

"*Third.* The court erred in admitting in evidence the testimony of Martin B. Holland that the sale from Lawrence Holland to himself was made in good faith.

"*Fourth.* The court erred in excluding from the jury the portions of the day book and ledger offered by plaintiffs in error.

"*Fifth.* The court erred in admitting the testimony of

Lawrence Holland to the effect that he claimed a defense against the \$3,000 note held by the Commercial Bank of St. Louis.

"Sixth. The court erred in admitting the testimony of J. M. Roberts, J. S. Tewksbury, and Ed. Cooper on cross-examination, to the effect that Lawrence Holland claimed to have a defense against the \$3,000 note held by the Commercial Bank of St. Louis.

"Seventh. The court erred in admitting the testimony of Martin B. Holland on rebuttal, as to where he got the money which he claimed to have loaned his father in 1885.

"Eighth. The court erred in giving instructions numbered 3, 5, 6, and 12, asked by defendant in error, and in giving instructions numbered 5, 6, 7, 8, 11, and 12, given by the court on its own motion.

"Ninth. The court erred in refusing to give instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20, asked by plaintiffs in error.

"Tenth. The court erred in permitting C. O. Whedon, one of the attorneys for defendant in error, to exhibit portions of the day book and ledger, which had been excluded, to the jury while making his argument.

"Eleventh. There was misconduct on the part of C. O. Whedon, one of the attorneys for defendant in error, in exhibiting to the jury portions of the day book and ledger which had been excluded from the evidence.

"Twelfth. There was misconduct on the part of the jury while deliberating upon the verdict in this cause.

"Thirteenth. There was misconduct on the part of the bailiff who had the jury in charge while they were deliberating upon the verdict in this cause.

"Fourteenth. The verdict returned by the jury is contrary to instructions numbered 1, 2, 3, 4, 9, and 10, given by the court on its own motion.

"Fifteenth. The judgment is contrary to the evidence and the law.

"Sixteenth. The court erred in overruling the motion for a new trial on the ground of newly-discovered evidence.

"Seventeenth. The court erred in overruling the motion for a new trial."

Upon the trial the defendants called J. S. Tewksbury, a witness on their behalf, and put to him the following questions:

Q. Did you hear the testimony of Lawrence Holland, last night, as to his having any conversation with you as to placing his property out of his name, and placing the Springfield yard in the name of Martin Holland?

A. I did not.

Q. State whether or not it is a fact that you had a conversation with him upon the train in relation to this matter?

Objected to, because no foundation was laid for this question on the examination of Mr. Holland, and also as immaterial, irrelevant, and incompetent. Sustained.

Q. I will ask you if, in the month of March, or thereabouts, you had a conversation with Mr. Lawrence Holland, upon the train on the Missouri Pacific railroad, about the matter of his placing this lumber yard out of his hands.

A. I don't think that I had in March.

Q. I will ask you if at any time, upon the train, you had a conversation with him upon that matter?

A. There was a conversation in regard to the lumber yard; it was some time in April.

Q. By the court: Where?

A. On the train, on the Missouri Pacific Railroad, between Springfield and Omaha.

Q. By Mr. Wooley: State what that conversation was?

Objected to as above.

Q. By the court: What time in April?

A. I couldn't state the exact date. I think it was the latter part.

Q. By Mr. Wooley: I will ask you if, upon the Missouri Pacific train, along in the month of April, Mr. Holland stated to you that his brother Martin Holland was running the Springfield yard in Martin's name, in order that, if the Commercial Bank of St. Louis got a judgment against him upon that note of \$3,000, he could beat them on the execution.

Objected to as leading, and as above. Sustained.

The defendants also called J. M. Roberts, a witness on their behalf, and put to him the following questions, among others:

Q. State whether or not, soon after this yard at Springfield began to be run in the name of Martin Holland, if you had any conversation with Lawrence Holland about it, before the 19th day of April?

A. Yes, sir.

Q. State as near as you can what that conversation was, so far as it appertained to the Springfield yard being run in Martin's name?

A. I can't tell you the exact date, some time in March I think; I asked him if this yard, he spoke about the yard being run in Martin's name, if Martin had bought the yard; he said not; Martin was running it for half the profits, he to furnish the capital; he had agreed to furnish about \$5,000, and he said to me, do you think I have sold it? I told him I did not know whether he had; he said, I have not, it is mine.

Q. State what, if anything, he said in the conversation about why it was run in Martin's name?

Objected to as immaterial and leading, and assuming a fact not proved. Sustained.

Q. State whether or not he said anything about why it was run in Martin's name?

A. Yes, he did.

Q. Now state what he said?

A. He said he wanted to fix his property so that if

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they got judgment against him on that note, they could not find any property to levy an execution on ; he wanted to put it in that shape to avoid the payment of that note.

* * * * *

Q. State if, between the first day of March and the 19th day of April, Mr. Lawrence Holland came to Springfield and, at the time, told you he came here to sell this yard ?

Objected to as leading, incompetent, and immaterial. Sustained.

Q. State what, if anything, Mr. Lawrence Holland, between the 1st day of March and the 19th day of April, said to you about selling this yard at Springfield ?

A. He told me he was coming up here to see about selling it, to raise some money.

Q. I will now ask you what, if anything, Mr. Holland said to you about the ownership of that yard between the 1st day of March and the 19th day of April ?

A. He said it was his yard.

Q. I will ask you to state what, if anything, he said to you about selling this yard the 1st day of June, 1886.

Objected to as irrelevant, immaterial, and incompetent. Sustained.

According to the testimony of Martin B. Holland he purchased a one-half interest in the lumber yard in the latter part of February, and the other half on the 19th day of April, 1886. It was evidently the intention of the trial court to admit any declaration of Lawrence Holland made in reference to the ownership or transfer of said yard or any interest therein prior to said last mentioned date, and to exclude all such declarations made by him subsequent thereto. Under the authority of the first case cited by counsel for plaintiff in error, this was right. In that case, *Carney v. Carney*, 7 Bax. (Tenn.), 284, Carney, Sen., while insolvent, had conveyed without consideration to Carney, Jr., his son, certain lands of which the vendor

remained in the actual possession. The case turned on the *bona fides* of this sale. On the trial the declarations of Carney, Sen., made after the conveyance, but while he remained in the actual possession of the land, were admitted in favor of the party attacking the sale. The court, in the the syllabus, say: "As a general rule the declarations of a party made after he has parted with his interest in the subject-matter of litigation cannot be received to disparage the title or right of a party acquired in good faith previous to the time of making such declarations. But this very just and reasonable principle must be taken as inapplicable to cases of fraudulent sales of property. If, for example, a conveyance is made absolute on its face, and the vendor continues to retain possession of the property, as before, this being *prima facie* evidence of fraud, a creditor, impeaching such conveyance on the ground of fraud, may be admitted to prove the declarations of the vendor, thus retaining the possession in relation to the ownership, or the character of his possession of the property."

Counsel for plaintiff in error seem to claim that the declarations of Lawrence Holland in regard to the ownership of the lumber yard, without regard to the time when such declarations were made, are admissible in evidence on the part of the party attacking the sale, on the ground that they are the declarations of a co-conspirator of the party sustaining the sale. I doubt the application of the peculiar law of conspiracy to a case like the one at bar. And were it conceded to be applicable to such cases, in general, it could only be applied after proof of a conspiracy including the party to be affected by the declarations as well as the one making them.

The second and third assignments will be considered together.

At the trial the plaintiff was recalled as a witness in his own behalf, and asked the following questions:

Q. I will ask you to state what knowledge you had,

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if any, of the indebtedness of your brother at the time of the sale to you of this property. State all of the facts in regard to this matter.

A. I had no knowledge whatever of his indebtedness; any indebtedness.

Q. What was your purpose in buying this property?

A. More than anything else, to do business for myself.

Q. Was this done for the purpose of assisting your brother to cover up his property in any way?

Objected to as calling for a conclusion of the witness. Overruled.

A. No, it wasn't.

Lawrence Holland, upon his examination in rebuttal, as a witness for the plaintiff, had the following questions propounded to him:

Q. I will ask you to state whether or not the sale and transfer of this property in controversy in this action, to the plaintiff, was made for the purpose of defeating or hindering any of your creditors in the collection of their debts?

Objected to as incompetent and not proper rebuttal. Overruled.

A. It was not, as I didn't count at the time I had any creditors only what were amply secured.

And again:

Q. State whether or not the sale to your brother of the property in question was an actual *bona fide* sale of the property by you to him.

Objected to as not proper rebuttal, calling for a conclusion of the witness and incompetent. Overruled.

A. Yes, sir, it was.

The admission of this testimony constitutes the ground of the 1st and 2d assignments. The only authorities cited in support of this point is the case of *Monteith v. Bax*, 4 Neb., 166. That case is only authority to the effect that, "The question of intent in case of an alleged fraudulent

conveyance of property * * * is one of fact for submission to a jury."

In the courts of the state of New York it seems to have been settled by the case of *Seymour v. Wilson*, 14 N. Y. R., 567, that, "On an issue of fact as to whether an assignment or transfer of property was made to hinder, delay, or defraud creditors, it is competent, where the assignor is a witness, to enquire of him whether in making the assignment or transfer he intended to delay or defraud his creditors." See also *Cunningham v. Freeborn*, 11 Wend. R., 240. Also *Persse & Brooks Paper Works v. Willett*, 19 Abb. Prac. R., 416.

Upon the cross-examination of the plaintiff his attention was called to certain erasures made in his books of account, and the fact of two or more leaves having been torn out of his ledger, page 121, was corrected by an erasure, and pages 119 and 120 torn out. His attention was also called to his day-book, and he stated in answer to questions by counsel for defendants that certain items were posted to pages 119 and 120 of the ledger which had been torn out. He also stated that these erasures had been made and leaves torn out by himself, to correct errors and mistakes which he had made of entries therein.

After plaintiff had closed his case in chief, and defendants had entered upon the examination of witnesses on their behalf, they offered the several pages of the plaintiff's day-book and ledger, showing the said erasures, alterations, etc., in evidence, which was refused by the court; which refusal forms the basis of defendant's fifth assignment of error. I am somewhat at loss as to the purpose for which defendants sought to introduce the books in evidence. Surely not as books of account, to prove charges made by one party against the other, which, as I think, and as this court has often held, is the only purpose for which books of account, simply as such, are admissible in evidence. If the purpose was to weaken the force of plaintiff's testi-

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mony as to the fact of his purchase of the lumber yard, and collateral facts, then that purpose would be accomplished as well by the cross-examination of plaintiff in respect to these erasures, alterations, and missing pages ; as well without the admission of the books themselves, technically, in evidence, as with. It appears from the tenth assignment of error that upon the argument of the case to the jury the court permitted counsel for the plaintiff to exhibit these books to the jury and comment upon these faulty and missing pages in his argument. The court would, doubtless, have recognized this right in the counsel for defendants also had they chosen to avail themselves of it, and by that means all the advantage which could possibly have been gained by the admission of the books in evidence would have been attained without. But as a question of law, I know of neither principle nor authority that was violated by the exclusion of the books when offered in evidence.

The fifth and sixth assignments may be considered together.

After the examination-in-chief of the witness, Lawrence Holland, by counsel for plaintiff, he was cross-examined by the other side ; first, about a certain trip which they claimed witness had made to Springfield, shortly after April 19, 1886, for the purpose of selling the lumber yard in question ; and, among others, they asked him the following questions :

Q. Isn't it a fact that you came to Springfield very close to the first day of June, after certain notes of yours, one for \$4,000 and one for \$3,000, had become due at the Commercial Bank, and that you then told Mr. Roberts that you were coming here to try and sell those yards to pay that note?

A. No, sir.

Q. When did those notes become due?

A. The 19th day of May.

* * * * *

Q. I will ask you if it is not a fact that about this time, March 1, 1886, the Commercial Bank of St. Louis held a note against you of \$3,000, and that Tewksbury & Cooper were endorsers upon that note?

A. I don't know who held the note on the 1st day of March.

Q. Is it not a fact that there was in existence a note of \$3,000, which you had given Tewksbury & Cooper, which had been endorsed by them to some one, and if the Commercial Bank of St. Louis did not claim to hold that note?

A. I don't know, really, that the Commercial Bank claimed any ownership; there was such a note out, but I don't know; the Commercial Bank didn't claim to own it at that time.

Q. Is it not a fact that yourself and Mr. Tewksbury had several conversations in regard to that note, and how you could avoid the payment of it?

A. In regard to how we could fix it to not pay it? There was no conversation in regard to not paying the note, except how we could bring a claim against Redmond, Clary & Co.

Q. This note was first transferred by Tewksbury & Cooper to Redmond, Clary & Co.?

A. Yes, sir.

On re-direct examination, counsel for the plaintiff put the following questions to the witness:

Q. You may state the facts in regard to this transaction with Redmond, Clary & Co.; what the real facts were, whether you were indebted to them or not?

Objected to as immaterial and irrelevant and incompetent, and not redirect. Overruled.

A. My claim against Redmond, Clary & Co. amounts to something like \$7,000; the note was for \$3,000. * *

Q. Did you, in fact, owe them anything?

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A. No, sir, I didn't; they owe me over \$7,000.

J. M. Roberts, cashier of the Commercial Bank of Weeping Water, was sworn and examined as a witness for the defendants. He was cross-examined by counsel for the plaintiff, re-examined and re-cross-examined, but I find nothing in his testimony to which the assignments under consideration will apply.

J. S. Tewksbury was sworn and examined as a witness on the part of the defendants. In the course of his examination the following questions were put to him, which he answered as follows :

Q. State if you were an indorser upon the \$3,000 note that was in the hands of the Commercial Bank of St. Louis ?

A. I was.

Q. I will ask you if you were not made a party upon that suit on the note, in the United States court ?

A. I believe I was.

Q. When did that note mature ?

A. Came due the first of March, I think.

Q. State if you and Mr. Holland had a conversation in regard to that note about the time it became due ?

A. Shortly afterwards.

Q. I will ask you if, within a few days, four or five, after this note became due, you had a conversation with Lawrence Holland about it ?

A. I did.

Q. State fully what he said, if anything, about putting his property out of his name, so as to defeat the collection of that note ?

A. He said he had his property in such a shape that he could and he would do it, before he would pay it, etc.

On cross-examination by counsel for plaintiff :

Q. At the time you say you had this conversation with Lawrence Holland in regard to Redmond, Clary & Co. business at St. Louis, that note, you say that Holland said he would not pay the note ?

A. He said he did not intend to.

Q. Did he say at that time that Redmond, Clary & Co. owed him?

Objected to as immaterial, and not proper cross-examination. Overruled.

Not answered.

Q. Did he say in that conversation that Redmond, Clary & Co. owed him?

A. He had a claim against them. He said he had.

The object of this cross-examination of Lawrence Holland, and examination-in-chief of J. S. Tewksbury, by counsel for defendants was to show the motive on the part of Holland for selling or putting the lumber yard out of his hands, to avoid paying the note spoken of. For that purpose they drew out a statement of certain facts from Holland. The additional facts drawn out on re-examination by counsel for plaintiff were, as I think, proper for the purpose of exhibiting the entire transaction to the jury, and the evidence was admissible. The examination of the witness, Tewksbury, was addressed to a certain conversation between him and Lawrence Holland; and his cross-examination by counsel for plaintiff was proper and admissible for the purpose of presenting the entire conversation, and of presenting that part of it which might be deemed favorable, as well as that which was unfavorable to the plaintiff. I know of no principle of the law of evidence more firmly settled than that when a part of a conversation is drawn out by one party, the other party has the privilege to draw out, from the same witness, the entire conversation.

As to the seventh assignment, counsel for the defendant had rigidly cross-examined the plaintiff as to the source from which he had derived the money which he had loaned to Lawrence Holland, and which he claimed constituted a part of the consideration for the purchase of the property in litigation. Some of this money he claimed to have received from his father, in payment of a loan made to him

a year or more before. The object and tendency of much of this cross-examination was to cast a doubt and discredit upon this claim of the plaintiff, and I think it was altogether proper to allow the plaintiff to testify in rebuttal, as to where he obtained the funds out of which said loan was made; and I know of no principle of law which was violated thereby.

The eighth assignment is based upon certain instructions given by the court to the jury. In this assignment there is some confusion. The record shows that all of the instructions asked for by either party were refused, the court having already, as shown by the sequence of the record, given sixteen instructions on its own motion, as follows:

"1st. The action is brought against the defendant Campbell, who is the sheriff of this county, and the other defendants, who are sureties upon his bond, given as such sheriff before entering upon the duties of his office.

"2d. The alleged ground of action is, that the conditions of the bond were violated, by reason of the sheriff, through his deputy, wrongfully seizing and taking possession of the stock of lumber and other property in question, as to which evidence has been given.

"3d. It is conceded in the case, and you should assume this to be true, at the time of the levy in question the sheriff, Campbell, had in his hands an order of attachment issued in an action commenced in Cass county, Nebraska, in which the Commercial Bank of Weeping Water was plaintiff, and one Lawrence Holland was defendant; and that the property in controversy was levied upon and seized under such order of attachment, as being the property of Lawrence Holland.

"4th. If this property so levied upon and seized, or an undivided interest therein, was the property of Lawrence Holland, as between him and his creditors, then such levy and seizure were lawful and the plaintiff cannot recover.

"5th. If on the contrary the property was wholly the

property of the plaintiff, as between him and the creditors of Lawrence Holland, the order of attachment gave the sheriff no authority to levy on the property, and the plaintiff is entitled to recover. It appears in evidence that prior to any transfer of the property to plaintiff, Lawrence Holland had an interest therein as a member of a firm to which it belonged; that such firm made a transfer of the property to the plaintiff, and that subsequently Lawrence Holland transferred to the plaintiff whatever interests he had therein. By these transfers the title to the property rested in the plaintiff, as between the parties to the transfers, but whether or not such transfers were valid as to the creditors of Lawrence Holland is a different question involving other considerations, and it is one of the principal questions for you to determine.

"6th. If the sale or transfer of the property, or an interest therein, was made with the intent to hinder, delay, or defraud the creditors of Lawrence Holland, and if the plaintiff knew of such intent when he purchased the same, then such sale or transfer was void as to such creditors, and the sheriff had a right to make the levy and seizure in question, and this action cannot be maintained. And in such case the payment of a valuable or a full consideration for the property or interest purchased would not protect plaintiff, but such sale or transfer would still be void as to Lawrence Holland's creditors.

"7th. If, however, the plaintiff paid a valuable consideration for the property, and bought the same in good faith without any knowledge of an intent on the part of Lawrence Holland to hinder, delay, or defraud his creditors, then the plaintiff acquired a valid title thereto, notwithstanding any fraud, if such there was, on the part of Lawrence Holland; and notwithstanding the consideration paid was not the full value of the property, should you find that such was the fact.

"8th. In determining whether or not Lawrence Hol-

land intended to hinder, delay, or defraud his creditors, you may inquire into the extent of his indebtedness; and of his property and means of meeting it; and as to how far the same was secured, whether in whole or in part; and as to whether he claimed in good faith to have a defense to any apparent indebtedness against him; and generally as to whether he had or had not a motive or inducement to place his property beyond the reach of creditors. But the mere fact that he claimed to have and believed he had a good defense against notes which he had given would not justify him in transferring property for the purpose of protecting it against proceedings for enforcing a claim on such note.

"9th. As to plaintiff's knowledge of a fraudulent intent on the part of Lawrence Holland it is not necessary that plaintiff should have had actual and positive knowledge of such intent, if it existed, but if he had knowledge of facts and circumstances tending to show the existence of such an intent, and sufficient to lead a man of ordinary perception, care, and prudence to suppose that there was such an intent, this would be equivalent in law to a knowledge thereof if in fact there was such fraudulent intent on the part of Lawrence Holland.

"10th. Evidence was received during the trial as to acts and declarations of Lawrence Holland prior to the transfer in question. These were received only as against him, and as tending to show a fraudulent intent on his part, but they are not evidence against the plaintiff to show fraud or knowledge of fraud on his part, and it is necessary to show his participation in the fraud by other evidence.

"11th. In determining whether the transfers in question were fraudulent as to creditors you are at liberty to consider the relation of the parties thereto to each other, the time and circumstances thereof, whether or not Lawrence Holland was indebted beyond his means of payment, or had a motive to place his property beyond the reach of

his creditors, whether or not the plaintiff knew or had the means of knowing his brother Lawrence's financial condition, or with what motive or purpose he was making the transfer, what the plaintiff's means of payment were, and his object in making the purchase, the value of the property and the amount paid therefor, and all the facts and circumstances of the transactions appearing in evidence, including the agreement as to the terms on which Lawrence Holland was to hold the note taken in part payment.

"12th. Fraud is not to be presumed; and in this case the burden of proof is upon the defendant to satisfy, you by a preponderance of evidence of a fraudulent intent on the part of Lawrence Holland and knowledge thereof on the part of the plaintiff.

"13th. Where in the trial of a suit a party places a witness upon the stand he thereby indorses his reputation for truth and veracity, and he will not be permitted to say that such witness is unworthy of belief.

"14th. The court instructs the jury that under the pleadings and proofs in this case the plaintiff is not estopped from asserting his right to the property in controversy.

"15th. If the jury believe from the evidence that the plaintiff actually and in good faith purchased the property in question from Lawrence Holland, without any fraudulent intent on his part, and with no knowledge of a fraudulent intent on the part of his grantor, then it is wholly immaterial whether or not the consideration paid, either in money or notes, was equal to the value of the property so purchased by plaintiff.

"16th. It is admitted by the said defendant and Artemas W. Campbell that the property in question was, on the 24th day of June, 1886, by his deputy, taken from the possession of the plaintiff, and it is also admitted that said defendant has ever since deprived the plaintiff of the possession of the same, and if the jury believe from the evidence that the property in question did at the time this

action was commenced belong to the plaintiff, then the measure of damages for plaintiff to recover will be the value of the property at the time of the taking as shown by the evidence, with interest thereon at the rate of seven per cent per annum from the 24th day of June, 1886, up to the first day of this term of court, to-wit, November 8th, 1886."

Counsel, in their brief, urge objection to the sixth instruction on two grounds. *First*, as to the knowledge on the part of Martin Holland of the fraudulent intent of Lawrence. It is assumed that this instruction was wrong, and hence that a subsequent one, stating the law correctly, would not remedy the wrong. To this point they cite the case of *Wasson v. Palmer*, 13 Neb., 376. The point in that case, to which reference is doubtless made, is thus stated in the syllabus: "If one of the paragraphs in the charge of the court to the jury misstate the law upon a material point, such error will not be cured by another paragraph which states the law correctly; because the jury will be left in doubt as to which paragraph was correct."

The sixth paragraph of the charge which we are now considering does not misstate the law. While it does not fully state the law applicable to the point being considered, so far as it goes, it states it correctly. And in so far as it falls short of stating the law fully, that deficiency is supplied by the ninth paragraph of the same instructions.

In the case of *Bartling v. Behrends*, 20 Neb., 211, the court, in the syllabus, say: "The instructions given to a jury must be construed together, and if when considered as a whole they properly state the law, it is sufficient."

Second. Under this subdivision counsel in the brief say: "The jury are told that under the circumstances it would be wholly immaterial whether or not the consideration, paid either in money or notes, was equal to the value of the property so purchased by plaintiff."

Of this objection it is deemed sufficient to say that I place no such construction upon the language of the in-

struction. It would be easier to place that construction upon the language of the seventh instruction, but, even if so applied, it would be strained and unnatural.

Counsel misprint in the brief, and evidently have misread the fifth instruction. A careful reading of it cannot fail to show that the court did not tell the jury that "Martin acquired some title by the transaction," but that by virtue of the transfer of the property by Beardsly, Clark & Co., and the subsequent transfer by Lawrence Holland of all interest he had in the property to Martin Holland, he acquired the title to the property as against Beardsly, Clark & Co. as a firm, and Lawrence Holland, but leaves the question of title as between Martin Holland and Lawrence Holland's creditors to other considerations, which the court declared to be one of the principal questions involved in the case.

As to the eighth instruction, I think the law is well and carefully expressed. Its meaning, I understand to be, that, while the belief on the part of Lawrence Holland that he had a valid defense to the \$3,000 note would not justify him in putting his property out of his hands, for the purpose of avoiding his possible liability to pay it, yet such belief on his part might be considered, among other facts, in arriving at a conclusion as to whether or not he had a motive or inducement to place his property beyond the reach of his creditors.

The eleventh instruction is objected to as leaving it to the option, or whim, of the jury whether they should consider the several matters therein mentioned or not. It will not be contended that it would have been proper for the court to have told the jury what degree of weight they should give to any, or all, of the several matters referred to in the said instruction. It was addressed to a jury supposed to be impartial, as between the parties, and open to instruction as to what portions of the great mass of testimony in the case it was proper for them to consider, in

arriving at their verdict. Had the instruction told them that in considering of their verdict it would be proper for them to take into consideration the several matters therein specified, no one could doubt its correctness, and that is the sense in which the language actually used was, and should have been, understood by the jury.

The objection of counsel to the twelfth instruction involves the same considerations as those already passed upon, while discussing the sixth paragraph, and it is deemed unnecessary to repeat them.

The third instruction stated by counsel in the brief to have been given at the request of the plaintiff, appears in the above list of instructions as given by the court on its own motion, as paragraph 13. It states the law correctly; *non constat*, that a party may not at a trial call the opposite party, or a witness, who proves, upon his examination, to be unfriendly to the party calling him, and then call other witnesses to contradict his evidence.

The following instructions were asked by the defendants and refused by the court, and to which refusal the defendants excepted :

"II. In determining the question of whether or not the sale, if you find there was one from Lawrence to Martin Holland, was fraudulent and made with the intent to defraud the creditors of Lawrence Holland, you should take into consideration all the surrounding circumstances as shown by the evidence. Fraud can seldom be proven by direct testimony, because fraudulent purposes are generally kept secret by those interested, and hence the law permits fraud to be shown by proving the surrounding circumstances having a tendency to show fraud.

"III. A sale to a near relative does not of itself show fraud, but when the seller is heavily in debt or insolvent, and sells property to a near relative, it is proper for you to take into consideration the fact that the purchaser is a near relative of the seller, and if there are any circumstances

brought out by the evidence, such as a knowledge by the purchaser of the seller's financial embarrassment, or any secrecy in the sale, or any exercise of authority over the property by the seller after the sale, or inadequacy of consideration paid them, the fact of relationship becomes an important one, and you should give it proper weight in determining whether the sale from Lawrence Holland to Martin Holland was made to defraud the creditors of Lawrence Holland or not, to hinder or delay his creditors in the collection of their debts, and Martin Holland bought said property in order to assist his brother in said purpose, or had such notice of the fraudulent intent of his brother as to put an ordinarily prudent man upon inquiry, then such sale would be fraudulent and void in law, and stand as no sale at all, and the property would, in law, remain the property of Lawrence Holland and be subject to attachment for the payment of his debts, and your verdict should be for the defendants.

"V. The jury are further instructed that the change of possession from the vendor to the vendee, in contemplation of law, is an actual change of possession and not a merely constructive change, and is an open, visible, and public change, showing that the property was actually transferred from Lawrence Holland to Martin B. Holland, and that the possession of an agent is constructively the possession of his principal; and if the jury find that Martin B. Holland was a servant or agent of Beardsley, Clark & Co., of which firm Lawrence was a silent member, and that Beardsley, Clark & Co., as a matter of fact, transferred said lumber yard to Lawrence Holland in place of to Martin B. Holland, and that Martin B. Holland pretended and held out to the public that he was the vendee of Beardsley, Clark & Co., then there was no actual change of possession, such as is contemplated by the law, and if you find the facts to be as stated above then said Martin B. Holland was possessed of knowledge of facts sufficient to put him

on inquiry, and was in a position to know why Lawrence Holland did not make the sale openly to Martin B. Holland in place of having his vendor convey over him to said Martin, and you must find for the defendant.

"VI. If you find that the said Martin B. Holland, plaintiff, did not make any claim of ownership of the yard in controversy when the levy was made upon it by the sheriff, and did not bring such claim to the notice of said defendant, then it is a strong circumstance going to show that said Martin B. Holland was not the real owner of said yard.

"XI. A conveyance of personal property by one largely in debt, especially where the creditors are insisting on settlement, and where the grantor and grantee sustain the relation of brothers, creates presumption of fraud, and requires clear proof on the part of the grantor and grantee to remove, and the fact that a full price was paid for the property will not rebut the presumption of fraud.

"XII. The jury are instructed that every man intends the necessary consequences of his own acts, and if the conduct of a debtor results in defrauding his creditor he is presumed to have foreseen the result, and intended it; and a transfer made out of the usual course of business is evidence of fraud.

"XIII. If you find that Martin B. Holland was a creditor of Lawrence Holland, and accepted a conveyance of the said lumber yard under circumstances that would put an ordinarily prudent man on enquiry, he is not a purchaser in good faith, and is a participant in the fraud of this grantor.

"XIV. If the jury find that Martin B. Holland, at any time after March 1st, 1886, conducted said lumber yard in the name of Martin B. Holland, and was really not the owner of said yard, but was receiving a share of the profits as compensation, and that Lawrence Holland was the real owner, and had creditors who were pushing

him for settlement, or threatening suit, then the presumption of the law is that the pretended ownership of said Martin B. Holland was fraudulent as to creditors, and that a state of relations once proved to exist between parties continues to exist until the contrary is proven.

“XVIII. You are further instructed that any collusion between Lawrence Holland and Martin Holland for the benefit of Lawrence Holland would render the transfer void. If you find from the evidence that a note was given for the yard, either as a fictitious consideration, or secretly, as a part of the consideration, so that Lawrence Holland could control the note for his own use, this would be a fraud upon the creditors of Lawrence Holland, and make the transfer void, and your verdict should be for the defendants.

“XX. You are further instructed that when the fraudulent intent of the grantor is shown, the grantee must show the payment of an adequate consideration by competent evidence. The facility with which a fictitious consideration may be fabricated renders it necessary for him to produce all the proofs, which may reasonably be supposed to be in his power, of the reality and fairness of the transaction, and the want of clear proof is evidence of fraud; such proof is vital to uphold a transfer in other respects surrounded with suspicion; and this requirement is not met by the mere proof of payment without showing where the money came from, and how it was obtained; and if the grantee claims to have had money loaned out with which he made payment, then his failure to produce the testimony of any of the persons to whom it was loaned, or the written evidences of the debt, or the mortgages by which it was secured, if any of these things may reasonably be supposed to be in his favor, are circumstances to be taken against him.”

It would be impossible, without extending this opinion to an inadmissible length, to discuss these instructions. I

will, therefore, content myself with saying that, in so far as they state the law applicable to the pleadings and evidence in the case correctly, the same was given in equally correct language in the instructions by the court on its own motion; and that when such is the case such additional instructions may properly be refused.

Counsel, in the brief, complain that the court failed to instruct the jury as to the issues in the case. While this complaint may have some foundation as matter of form, it has none in reality. The first five instructions sufficiently present the issues in the case, and it may be added that none of the instructions presented by defendants, and refused, purport to contain a statement of the issues.

Defendants claim that there was misconduct on the part of the jury, for which they were entitled to a new trial, in that one of the jurors separated himself from his fellows after they had retired and before they had agreed upon their verdict. Also that there was misconduct on the part of the bailiff having said jury in charge. I have carefully examined and considered the voluminous supplemental bill of exceptions containing the affidavits both in support of and in resistance to the motion for a new trial. The evidence contained in these affidavits is altogether conflicting. Not a material fact is alleged in the affidavits in support of the motion which is not denied or explained away by those in resistance.

The above does not fully apply to the allegations of newly discovered evidence. This consists in the fact that J. F. Parkins would testify that in February, 1886, he told the plaintiff that Lawrence Holland had told him that he expected to have trouble with Redmond, Cleary & Co., in regard to losses which they claimed he had sustained in *option deals*; that plaintiff said in reply that he, Lawrence, had too much confidence in Redmond, Cleary & Co., and that they would *beat* him some day.

This testimony, if admissible in chief, would be valuable

only as cumulative evidence. As an independent fact such conversation between the plaintiff and Parkins would fall far short of proving or establishing facts within the knowledge of the plaintiff sufficient to amount to constructive notice of his brother's insolvency or fraudulent purpose in disposing of the lumber yard. A new trial will never be granted on account of newly discovered evidence merely cumulative in its character.

Finally, the testimony is too conflicting upon every material point, even where there may seem to be a preponderance in favor of the defendant, to admit of a reversal of the judgment on the ground that the verdict is not sustained by the evidence.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

REESE, J., concurs.

MAXWELL, CH. J., dissents from the judgment.

STATE OF NEBRASKA, EX REL. CITY OF NORFOLK, v.
H. A. BABCOCK, AUDITOR OF PUBLIC ACCOUNTS.

Cities of the Second Class: BONDS FOR SEWERS. Section 39 of chapter 14 of the Compiled Statutes of 1887 confers upon cities of the second class having more than one thousand and less than five thousand inhabitants the right to make regulations to secure the general health of the city, and to construct sewers and to regulate their use. Under this authority it was held that when it became necessary for the city of N. to construct a sewer for the purpose of draining the surplus water from its principal street, it had the power to provide the necessary money to pay for the same, by the issuance of its bonds, such power being incident to and necessary for the carrying out of the authority expressly granted.

ORIGINAL application for mandamus, and submission of the same under Sec. 567 of the civil code.

F. A. Wigton, for relator, cited: *Mayor v. Newton*, 23 Ala., 660. *Traver v. Merrick Co.*, 14 Neb., 333. *Lowell v. Boston*, 111 Mass., 463. *Guernsey v. Burlington*, 4 Dill., 374. *Township v. Beasley*, 94 U. S., 313. *Bank v. Chillicothe*, 7 Ohio, 354. *Hubbard v. Sadler*, 10 N. E. Rep., 426. *Mills v. Gleason*, 11 Wis., 493. *State v. Madison*, 7 Id., 688. *Wyandotte v. Zeitz*, 21 Kan., 653. *Williamsport v. Commonwealth*, 84 Penn. State, 487.

William Leese, Attorney General, for respondent.

REESE, J.

This action is submitted under the provisions of section 567 of the civil code, the necessary affidavit that the proceeding is in good faith, to determine the rights of the parties, being filed.

The controversy is in relation to certain bonds issued by the city of Norfolk for the purpose of constructing a sewer. The bonds were issued in due form and presented to the auditor for registration and certification. That officer declined to register and certify the bonds, "solely on the ground that cities of the second class, having less than five thousand inhabitants, are not authorized to issue bonds to aid in the construction of sewers as works of internal improvement."

The cause is submitted upon an agreed statement of facts, which is as follows:

"The relator is, and for more than a year last past has been, a municipal corporation duly organized under the laws of Nebraska, a city of the second class, of over one thousand and less than five thousand inhabitants. On the first day of April, 1887, the assessed valuation of the re-

lator was not less than \$285,000. The relator has no bonded indebtedness prior to the bonds herein sought to be registered. The annexed transcript, marked 'Exhibit A,' which is incorporated into and made a part of this stipulation, is a true and accurate history and transcript of all things connected with and pertaining to the voting of \$8,000 of bonds of said relator, on the second day of September, 1887, for the purpose of constructing sewers in said city. The bonds referred to in said transcript have been duly issued by the relator and submitted to defendant, who is auditor of public accounts, for registration, but defendant refused and still refuses to register said bonds, solely on the ground that cities of the second class having less than five thousand inhabitants are not authorized to issue bonds to aid in the construction of sewers, as works of internal improvements."

The application is for a mandamus to compel the auditor to register and certify the bonds. That officer, not being satisfied as to his duty, declined to act, and submits the question to this court for its decision.

As the city of Norfolk is a city containing more than one thousand and less than five thousand inhabitants, its authority must be decided under the provisions of the first division of chapter 14 of the Compiled Statutes of 1887, and by the provisions of subdivision 26 of section 39 of that act. It is under that section that cities of the second class in their corporate capacities are authorized and empowered to enact ordinances, "to construct and keep in repair culverts, drains, sewers, and cess-pools, and to regulate the use thereof."

The question here presented is, does the conferring of this power upon the municipality authorize it to issue bonds for the purpose of aiding in the construction of sewers?

Upon the argument it was contended, on the part of the respondent, that subdivision 3 of section 69, of the same

chapter, which provides that the expenses of constructing bridges, culverts, and sewers shall be defrayed out of the general fund of the city or village, not to exceed two mills of the levy for general purposes. We think this provision must be held to apply to villages of the character named in section 40 of the same chapter, and containing not less than two hundred nor more than fifteen hundred (1,000?) inhabitants, and not to section 39, now under consideration. Therefore, the question of the power to issue bonds must be decided upon subdivision 26, above named.

The proposition submitted to and voted upon by the inhabitants of the city of Norfolk was that of issuing the bonds of the city, in the sum of \$8,000, for the purpose of aiding in the construction of a sewer along and beneath Norfolk avenue, by said city, and the necessary grading therefor, and running east on the north side of said Norfolk avenue, to the north fork of the Elkhorn river. It will therefore be seen that the purpose of the issuance of the bonds was to raise money to construct the sewer under this principal street, and for the purpose of grading the street.

By the subdivision of section 39, above referred to, the city is authorized to construct and keep in repair culverts, drains, sewers, and cess-pools.

Considerable attention was given, in the argument of the case, to the proposition that the sewer alluded to was intended as and for the purpose of draining the avenue referred to, and carrying off the surplus water accumulating thereon.

This subdivision confers upon the municipality in express terms the right to construct the sewer, and we think that it may safely be said that, even without statutory authority, the right to improve the street in such a way as to make it passable at all seasons of the year, would be an inherent right vested in the municipality without express statutory authority therefor. But without discussing that proposi-

tion we will simply inquire whether the express authority to construct a sewer will carry with it an implied authority to issue bonds to aid in doing so. The authorities upon this subject are substantially uniform, some of which will be briefly noticed.

In the city of *Wyandotte v. Zietz*, 21 Kansas, 653, which was an action to recover upon certain bonds issued by the city, denominated sidewalk bonds, it was held that the city had the power to issue the bonds in payment for the building of sidewalks, notwithstanding the fact that the money to be obtained with which to pay the bonds had to be collected as personal tax from the abutting lot owners. The act under which the city government had issued the bonds was to the effect that the city, acting under its provisions, were authorized and empowered to enact ordinances for the purpose of opening and improving streets, avenues, alleys, and making sidewalks within the city. The right of the city to pay its moneys for the construction of sidewalks was not questioned, but it was contended that since the charter provided that for making and repairing sidewalks the assessment should be made on lots abutting on the improvement, therefore the city could not issue bonds, in the first instance, for the construction of the sidewalk. But it was held that the corporation, being authorized in general terms to build the sidewalk, without specification of the manner or means, that it necessarily followed that it could contract with some person to furnish the material and provide the labor, to be paid for upon the completion of the work, and that the city had the power to agree upon the mode, terms, and time of payment, and to give suitable acknowledgment of indebtedness by bond, note, or other contract.

In *Desmond v. City of Jefferson*, 19 Federal Reporter, 483 (Texas), it was held that where the charter of the city empowered it to organize a fire department and regulate the same, and adopt such other measures as should conduce

to the welfare of the city, that the city was authorized to purchase a fire engine and issue its negotiable bonds therefor.

In the *State, ex rel. Dean, v. The Common Council of the City of Madison*, 7 Wis., 688, where the charter of the city in express terms conferred upon it the power to establish and regulate boards of health, provide hospital and cemetery grounds, and regulate the burial of the dead, it was held that the city was authorized to purchase the ground, and if necessary the common council could issue the bonds of the city to pay for them. The right to issue such bonds being implied from the authority to purchase the ground.

In *Mills v. Gleason*, 11 Wis., 493, it was held that where the charter of a municipal corporation conferred power to purchase fire apparatus, cemetery grounds, establish markets, and many other things for the consummation of which money would be a necessary means, it would also, in the absence of any positive restriction, confer power to borrow money as an incident to the execution of these general powers.

In *Clarke v. School District No. 7*, 3 Rhode Island, 199, it was held that the corporation might bind itself by an evidence of debt in a negotiable form for any debt contracted in the course of its legitimate business, in the exercise of the authority conferred by law.

Hubbard v. Saddler, 10 North Eastern Reporter (New York), 426, was a case where the county authorities were authorized by law to lay out and construct streets and avenues, and provide for the estimate and award of damages, and for the payment of them, and all other charges and expenses necessary to be incurred, by a limited or general assessment; it was decided that the supervisors had the power to issue bonds, running from two to six years, to raise money to pay for the awards and damages made in anticipation of the collection of revenues by the special or general assessment made. The statute conferred the right to issue bonds for the purpose of building bridges, pur-

chasing turnpike roads or toll bridges, buying lumber for town hall and constructing the same, including cemeteries, but not including the payment of damages to real estate by the laying out and construction of streets and avenues thereon. But it is held that practically the town was authorized to incur the debt to the land-owners, it was made responsible for its payment and authorized to provide the necessary means therefor, and therefore the supervisors had the authority to issue bonds to raise the money.

In *Kelly v. The Mayor, etc., of the City of Brooklyn*, 4 Hill, 263, it was held that the municipal corporation might issue negotiable paper for a debt contracted in the course of its proper business, and no provision in its charter or elsewhere merely directing a certain form, in affirmative words, should be considered as taking away this power. And the same was held in *Laws v. Cooley*, 2 Id., 265. See also, upon this same subject, the *Bank of Chillicothe v. The Town of Chillicothe*, 7 Ohio, 354.

In addition to the express powers conferred by the subdivision above quoted, the city had authority, under subdivision VI. of the same section, to make regulations to secure the general health of the city, and doubtless for this purpose the right to construct sewers is also given. If it becomes necessary for the health and convenience of the city to drain the principal streets by the use of underground drains or sewers, the power is given, in express terms, to do so. To say that this power existed but that the means to make it effective had been withheld, would simply destroy the authority and nullify the legislative grant.

We are fully aware of the necessity for great care in the exercise of the right to borrow money by municipal corporations, and that the power so to do should not be held to have been conferred except when expressly given or when absolutely necessary to carry out and make effective the power expressly conferred. But we think the present

Powers v. Craig.

case falls clearly within the latter class, and that the bonds were legally issued.

The writ will therefore be allowed.

WRIT ALLOWED.

THE other judges concur.

R. W. POWERS, PLAINTIFF IN ERROR, v. CHAUNCEY E. CRAIG, DEFENDANT IN ERROR.

1. **Prairie Fire: DAMAGES: NEGLIGENCE.** In an action for damages resulting from the destruction of property by fire negligently set upon the prairies of this state, the question of negligence is alone for the jury to determine.
2. — : **FIRE-GUARDS.** In such case, where it was shown that the fire originated at a camp fire built upon the prairie in the vicinity of a large quantity of dry grass, at one o'clock in the day, when the wind was high and blowing in the direction of the plaintiff's property, the question of the custom of the country in plowing fire-guards around such property is not a material inquiry. And especially so when a stream thirty feet in width was between the property destroyed by the fire and the place where the fire was kindled. In such case the failure to plow or burn fire-guards would not be contributory negligence.

ERROR to the district court for Cherry county. Tried below before TIFFANY, J.

D. A. Holmes, for plaintiff in error, cited : *Kesee v. C. & N. W. R. R.*, 30 Iowa, 83. *Slossen v. Burlington Ry.*, 14 N. W. R., 244. *Kellogg v. Railroad*, 26 Wis., 230. *Fahn v. Reichart*, 8 Wis., 106. 1 Thomp. on Neg., 119.

H. R. Bisbee and *J. H. Gurney*, for defendant in error, cited : *B. & M. R. R. v. Westover*, 4 Neb., 276. *Kellogg*

23	621
37	252
22	621
30	614
23	621
48	657

v. C. & N. W. R. R., 26 Wis., 230. *Moak's Underhill on Torts*, 287. *Thompson Neg.*, 167-169.

REESE, J.

This action was originally commenced in the county court of Cherry county, by Craig against Powers, to recover the sum of \$800 damages sustained by the plaintiff in the action, by reason of the destruction of hay by fire, which was alleged originated from a camp fire started by defendant while traveling through the country in the vicinity of the premises of the defendant in error.

The case was taken to the district court, by appeal, and tried to a jury, where plaintiff recovered a verdict and judgment. Defendant prosecutes error to this court.

It appears from the testimony, that at or about the time alleged in the petition, plaintiff in error was passing through the country near the premises of defendant in error with a number of cattle, and the men necessary to take charge of his herd and outfit, and about the noon hour camped near the premises of defendant in error, and for the purpose of preparing dinner, kindled a fire. The date was the 13th of October, 1884. It was a very windy day, and the surrounding grass was rank and dry. After eating dinner the men remained near the fire for perhaps half an hour, without rebuilding it, and when they left some water was thrown upon the remaining coals, but no special effort seems to have been made to see that the fire was all extinguished. The fire had been built in a small pit which was found, and is described as being about one foot and a half in length, and about one foot in width, and perhaps six inches deep. The grass had been previously burned around the pit a distance of about one foot, although some of the witnesses for the plaintiff in error testified that the width of the burnt space was probably six to eight inches. Very soon after the departure of the plaintiff in error and

his men from the fire, they discovered the prairie grass burning, not far from the place where they had eaten dinner, and under the force of the wind it was being driven toward the hay of defendant in error. A creek or stream of considerable size was between where the plaintiff in error had camped and the hay of defendant in error, the bed of the stream being estimated by the witnesses at from twenty to thirty feet in width. The fire was blown across this stream to defendant's premises, and the destruction of his hay followed.

A number of questions are presented by the record which will be noticed in the order of their assignment here.

The first is, that the court erred in overruling the objection to the testimony offered by the plaintiff below. This assignment has reference, we presume, to conversations testified to between witnesses of defendant in error and plaintiff in error.

Defendant in error was called as a witness and testified in substance that at the time of the fire he was at work on a railroad grade about a mile and a half distant from it; that when he saw the smoke he started in that direction on horseback, and on arriving there he discovered the pit, in which the camp fire had been built, and that the fire had not been extinguished; that he noticed a few "brands" with fire on them; that the fire had, at that time, burned a little to the south, but was running under the force of the wind to the north, in the direction of his hay, and that the plaintiff in error was there about the time of his arrival. He was then asked if he had any conversation with plaintiff in error. His answer being in the affirmative, he was directed to state what plaintiff in error said in reference to the camp fire. Over the objection of the plaintiff in error, his answer was: "I asked him how they thought the fire got away from there. They said they supposed they had the fire put out, or possibly it might have

been, that is what they said ; I do not remember the words exactly ; that is the substance of it."

We can see no objection to the admission of this testimony. It seems to have been conceded, and we think the facts fully sustain the claim, that the fire originated from the camp fire of plaintiff in error. No other cause is shown. It was discovered within a very few minutes after the departure of the men from the place where they built their camp fire. The fire was not extinguished. The grass was very dry and the wind was blowing a gale. It is true that another person, referred to in the testimony, was seen to pass by the camp during the time that the plaintiff's men were preparing to depart, but there is nothing in the testimony anywhere that he either meddled with that fire or started another. He was near the wagon talking with plaintiff's hands and left before they did, having gone a considerable distance before they drove away. The proof of the remark by the plaintiff in error that they thought they had extinguished the fire, even if it be construed into an admission, could work no possible prejudice to him, as the proof was ample as to the origin of the fire.

The next assignment of error is, that "The court erred in rejecting testimony offered by plaintiff in error." This objection refers to the offer of plaintiff in error, upon the trial, to prove "that the country in the vicinity of Mr. Craig's place, west of Valentine, in that locality, was unsettled prairie and but very little under cultivation, but that periodically prairie fires swept over the country devastating it, and that it was customary among the settlers who were there to protect themselves against damage by fire by either plowing or burning suitable fire-guards, and that the plaintiff had failed to provide such fire-guards."

This testimony was, upon objection by plaintiff in error, excluded. In this we see no error. It was alleged in the

petition that the fire had been negligently kindled at a distance of about 250 yards from the stacks of hay of defendant in error, and that plaintiff in error did carelessly and negligently leave the fire burning, and from such carelessness and negligence the prairie grass became ignited and the fire spread to defendant's land.

The proof showed the existence of the stream to which we have referred, and which, under ordinary circumstances, would doubtless have served as a fire-guard and would have protected defendant's property from fire running in the direction or course taken by the fire in question. The theory upon which this testimony was sought to be introduced was, the contributory negligence of defendant in error. This question was submitted to the jury by proper instructions from the court. The question of contributory negligence, if it arose in this case at all, was whether the negligence of defendant in error contributed to this particular injury. The fact that the country was "unsettled prairie and very little under cultivation," was fully shown by the testimony in the case, and if material to the defendant was sufficiently proven.

The simple question presented by this offer, we think, was as to the custom of settlers in the matter of plowing or burning fire-guards. Even if the circumstances under which the fire in question was kindled would permit an inquiry as to the negligence of the defendant, we can see no error in the exclusion of the inquiry, for the reason that it was shown by the testimony that no fire-guard had been made, the reliance of defendant in error being upon the stream to which we have referred as sufficient protection from fire in that direction. The question then as to the negligence of defendant in error was fully submitted. Upon the question as to what was the custom of the settlers, there was no necessity for inquiry.

The third assignment of error is, that "The court erred in refusing to give instructions asked by defendant." The in-

struction asked by plaintiff in error which the court refused to give was as follows: "You are instructed that if the plaintiff in this case failed to exercise the diligence that an ordinarily prudent man would, under such circumstances, have exercised in protecting the hay burned from being destroyed by fire which might be raging in the vicinity, by plowing, burning, or otherwise suitable fire-guards, then he is not entitled to recover in this case, unless the negligence of the defendant was grossly in excess of that of the plaintiff."

As we have already seen, the question as to whether or not defendant in error had plowed or burned fire-guards around his stacks, was not a material one to be considered by the jury, and that question need not be further considered. The question of negligence of defendant in error was a proper one for the jury to consider, under all the evidence in the case, and it would have been improper for the court to have instructed them as to what would or would not constitute contributory negligence. Considering the location of the hay and all its surroundings, the proximity of the stream to which we have referred, the question of contributory negligence was alone for the jury, and there was no error in refusing to give the instructions prayed for.

The fourth assignment of error is, that "The court erred in giving instruction on request of plaintiff." Although it is not shown by the record, yet we presume that instruction number *two*, given upon the court's own motion, is here referred to. This instruction is as follows: "You are instructed that the law of Nebraska makes it a misdemeanor for persons to negligently or carelessly set on fire any prairie in any part of this state. You are further instructed that everyone has a right to presume that no one will be guilty of a misdemeanor, and is, therefore, under no obligation to anticipate such negligence to guard against it; therefore if you find that the defendant or his agent did, negligently or carelessly, set fire to the prairie, and that such fire burned the plaintiff's hay, the defendant

would be liable for the damage, notwithstanding you might find from the evidence the further fact that the plaintiff had not sufficient fire-guard around the stacks, unless the plaintiff neglected, after he discovered the fire, to use all reasonable means within his power to prevent the injury therefrom."

The objection to this instruction is, that there was nothing in the record of the trial which would justify the court in instructing the jury concerning the criminal liability of plaintiff in error.

As we have before seen, the action was based upon the negligence of plaintiff in error, in permitting the fire to escape. The whole instruction taken together is simply a statement of the law, that the careless use of fire by which the prairies of the state might be ignited is prohibited by statute, and that the defendant in error would be under no obligations to anticipate such negligence on the part of plaintiff in error, and the further consideration that the absence of fire-guards would constitute no defense to the action.

Upon this latter part of the instruction, this court has sufficiently spoken in *B. & M. Railroad Company v. Westover*, 4 Neb., 268. As is indicated in that case, it may be said that it was clearly the duty of plaintiff in error to take the necessary precautions to prevent the escape of the fire kindled by him. Failing to do so, the question of his negligence, under the circumstances, would be determined by the jury.

The *fifth* assignment of error, "That the court erred in overruling the motion for a new trial," is substantially disposed of already.

There was sufficient testimony to warrant the finding of the jury, that plaintiff in error was the cause of the destruction of defendant's property. The question as to whether he or those under him acted negligently in permitting the fire to escape was one of fact for the jury.

They found against him upon this question. The testimony was ample to sustain the finding.

We have carefully examined the record and can find no prejudicial error. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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23	247
23	628
27	708
29	628
41	268

THE STATE OF NEBRASKA, EX REL. THE BURLINGTON
& MISSOURI RIVER RAILROAD COMPANY ET AL., v.
JOSEPH M. SCOTT, COMMISSIONER, ETC., AND JOHN
M. THAYER, GOVERNOR OF NEBRASKA.

1. **Practice: DISMISSAL OF ACTION.** Under section 430 of the code the plaintiff cannot as a matter of right dismiss an action after the final submission of the case to the court.
2. ——— : ———. Where a cause was submitted to the court on a demurrer to the petition and a decision rendered sustaining the demurrer, but no opinion filed, and afterwards and before the preparation of the opinion the plaintiff attempted to dismiss the action, to which the defendant objected, *Held*, That the attempt to dismiss was unavailing, and that the cause having been finally submitted final judgment in the case would be rendered.
3. **Railroads: RIGHT OF WAY.** Under Art. XI., Chap. 72, Comp. Stat. of 1887, only railroad companies organized under the laws of this state have the right to condemn right of way across lots owned by the state.
4. ——— : **EMINENT DOMAIN: FOREIGN CORPORATIONS.** Under section 8, Art. XI. of the constitution, no foreign railroad corporation doing business in this state can exercise the right of eminent domain or have power to acquire right of way or real estate for depot or other uses unless it organize as a corporation under the laws of this state.
5. ——— : ——— : ———. The C., B. & Q. R. R. Co. and the L. & N. W. R. R. Co. were joined as relators in an application for mandamus to compel the proper authorities to condemn and convey certain lots belonging to the state. *Held*, That the C.,

State v. Scott.

B. & Q. R. R. Co., being a foreign corporation, was not entitled to the relief, and that as a foreign corporation is prohibited from acquiring a right of way or real estate for depot or other uses, therefore it cannot do indirectly what it is prohibited from doing directly.

ORIGINAL application for mandamus.

T. M. Marquett and *J. W. Deweese*, for relators, on right of consolidation, cited: G. S., 1873, Sec. 114. Iowa Code, Sec. 1275. Right of eminent domain. *B. & O. R. R. Co. v. Koontz*, 4 Am. & Eng. Railroad Cas., 108. *Dietrich v. Lincoln & Northwestern R. R. Co.*, 13 Neb., 361. *C. St. P., M. & O. R. R. Co. v. Lundstrom*, 16 Id., 254. Right to the lands in question. *Gottschalk v. Lincoln & Northwestern R. R. Co.*, 14 Neb., 390. Mills on Eminent Domain, 351. *Hobart v. Ford*, 6 Nev., 77. *Penn. R. R. v. N. Y. R. R.*, 23 N. J. Eq., 157.

William Leese, Attorney General, for the respondents, cited: *Rorer on Railroads*, 38. *Atkinson v. M. & C. R. R.*, 15 Ohio State, 33. *Hull v. C., B. & Q. R. R.*, 21 Neb., 371. *Halbert v. St. Louis, K. C. & N. R. R. Co.*, 45 Iowa, 23.

MAXWELL, CH. J.

This is an application for a peremptory writ of mandamus to require the defendant, Joseph Scott, as commissioner of public lands and buildings, to forthwith prepare a deed for execution by the governor of certain lots owned by the state, and to require the governor to execute and deliver the same to the relators. The relators allege in their petition that, "they are corporations duly organized and existing under and by virtue of the laws of the state of Nebraska, that the Burlington & Missouri River Railroad Company in Nebraska formerly owned a line of railroad extending from the town of Plattsmouth, in Cass county, westwardly, through Saunders, Lancaster, and other counties,

to the town of Kearney, in Buffalo county, and that while it owned this line it leased other lines of railroad centering at Lincoln, Nebraska, and operated the same until the 1st day of January, 1880, at which time the said Burlington & Missouri River Railroad Company in Nebraska, by virtue of the laws of the states of Illinois, Iowa, and Nebraska, was consolidated with the Chicago, Burlington & Quincy Railroad Company, the latter becoming the owner of the said line of railroad formerly owned by the Burlington & Missouri River Railroad Company in Nebraska, and has continued to operate the said line, together with the leased lines above referred to, ever since. That in the said articles of consolidation referred to it was, among other things, provided that the Burlington and Missouri River Railroad Company in Nebraska hereby authorizes the first party (the Chicago, Burlington & Quincy Railroad Company), in the management and conduct of said property, and the sale or disposition thereof, to use the corporate name and seal of the second party (the B. & M.) so far as may be lawfully done, whenever and in such manner as it shall deem necessary or convenient to carry into effect the purposes of these articles, and the first party (the C., B. & Q.) is to and does hereby become liable for and assume all leases, contracts, liabilities, obligations, and debts of the party of the second part. That among the lines that were leased by the Burlington & Missouri River Railroad Company in Nebraska was the Lincoln and Northwestern Railroad, and which lease by the consolidation of said roads was transferred to the Chicago, Burlington & Quincy Railroad Company, and the said Lincoln and Northwestern Railroad has been operated by the Chicago, Burlington & Quincy Railroad ever since the 1st day of January, 1880.

"That prior to the said consolidation it became necessary, in the operation of the said lines of road by the Burlington and Missouri River Railroad Company in Nebraska, to obtain additional grounds at Lincoln, Nebraska, for trackage, depot, and round-house purposes,

and with that end in view purchases and condemnation of lots and lands were made as provided by law from parties who owned the same, and that situated among the grounds necessary for the use and occupancy of said lines of railroad were a number of lots belonging to the state of Nebraska. The said railroad company made application to the commissioner of public lands and buildings for the purchase of the lots belonging to the state at the time, but was informed that there was no authority of law to sell the same, but that the said company could take possession of said lots and use them until such time as the legislature would provide some law for the sale and conveying of the said lots. That said railroad company went through the process of condemning the said lots under the general law of the state providing for condemnation of property, in November and December, 1879, and offered the value as found by the appraisers to the then treasurer and the commissioner of public lands and buildings, which officers declined to accept the same, stating that they had no authority to receive the money or to make or contract the conveyance of said property. The said railroad company took possession of said lots in November and December of 1879; above referred to, and ever since has held the possession, which lots are described as follows: Block 280: all of lots 1, 2, 3, and 4, all of lot 5 lying and being outside of the right of way of the Nebraska Railway connecting track, and containing 6,800 square feet more or less, all of lot 6 lying and being outside of the right of way of the Nebraska Railway connecting track, and containing 4,000 square feet, more or less; block 281: all that part of lot 1 lying and being outside of the right of way of the B. & M. R. R. in Nebraska and the L. & N. W. R. R., and containing 4,800 square feet, more or less, all that part of lot 2 lying and being outside of the right of way of the B. & M. R. R. in Nebraska, and the L. & N. W. R. R., and containing 90 square feet more or less; block 282: all that part of lot 3 lying and being outside the

right of way of the L. & N. W. R. R., and containing 100 square feet, more or less, all that part of lot 4 lying and being outside the right of way of the L. & N. W. R. R., and containing 1,000 square feet, more or less, all that part of lot 5 lying and being outside the right of way of the L. & N. W. R. R., and containing 2,005 square feet, more or less, all that part of lot 6 lying and being outside the right of way of the L. & N. W. R. R., and containing 2,675 square feet, more or less; block 284: all that part of lot 3 lying and being outside the right of way of the L. & N. W. R. R. and the Nebraska Railway connecting track, and containing 3,490 square feet more or less, all that part of lot 4 lying and being outside the right of way of the L. & N. W. R. R. and the Nebraska Railway connecting track, and containing 2,175 square feet, more or less, all that part of lot 5 lying and being outside the right of way of the L. & N. W. R. R. and the Nebraska Railway connecting track, and containing 678 square feet, more or less; block 270: all of lots 4 and 5, all that part of lot 6 lying and being outside the right of way of the B. & M. R. R. in Nebraska, and containing 6,500 square feet, more or less; block 72: all of lot 8.

"That in the extension of depot facilities and yard room necessary to carry on the business of the Lincoln & Northwestern Railroad Company, it became necessary, in 1885, to obtain additional grounds for track purposes and yard room at Lincoln, Nebraska, and the said Lincoln and Northwestern Railroad Company duly appropriated and took possession in October, 1885, of the following described lots and parcels of real estate belonging to the state of Nebraska, to-wit: Block 8: all of lots 7 and 8; block 272: all of lot 4; block 278: all of lots 2, 3, 4, 5, 6, 7, 8, and 12; block 279: all that part of lot 5 lying and being outside the right of way of the connecting track of the Nebraska Railway, and containing 3,450 square feet, more or less; all of lot 10, all that part of lot 11 lying and being outside the right of way of the connecting track of

the Nebraska Railway, and containing 6,230 square feet more or less ; all that part of lot 12 lying and being outside the right of way of the connecting track of the Nebraska Railway, and containing 3,650 square feet, more or less ; block 267 : all that part of lot 3 lying north of the bank of Salt creek. There being no law at that time by which any title could be obtained, the said railroad company purchased all the adjacent ground to these lots that was owned by private parties, and took possession of the said lots and used the same ever since October, 1885. That a law was passed by the legislature in January, 1887, providing for the manner in which title may be acquired by railroad companies for right of way and other necessary purposes across lands and real estate belonging to the state of Nebraska, and that by virtue of said act, the said railroad companies made application to the commissioners of Lancaster county, Nebraska, to view and appraise the property hereinbefore described, both that which was taken and appropriated by the Burlington & Missouri River Railroad Company in Nebraska, in 1879, and also those lots and parcels of real estate belonging to the state that had been taken and appropriated by the Lincoln & Northwestern Railroad Company, in 1885, which application is in words and figures following, to-wit :

“ To the County Commissioners of Lancaster County, Neb.:

“ The Chicago, Burlington & Quincy Railroad Company and the Lincoln & Northwestern Railroad Company, each and jointly, respectfully represent that the Chicago, Burlington & Quincy Railroad Company is the owner of all the lines of railroad formerly owned by the Burlington & Missouri River Railroad Company in Nebraska, together with all depot grounds, rights, franchises, and property of every description in said state, and that it has the lease of the said Lincoln & Northwestern Railroad, and has the use of all its rights, franchises, and property of every description ; and that heretofore in the obtaining of the necessary depot grounds and right of way in the city of Lincoln,

in said county, the said Burlington & Missouri River Railroad Company in Nebraska and the Lincoln & Northwestern Railroad Company duly appropriated certain lots and parcels of real estate belonging to the state of Nebraska, and the Lincoln & Northwestern Railroad Company and the Chicago, Burlington & Quincy Railroad Company, as the successor of the Burlington & Missouri River Railroad Company in Nebraska, have occupied and used the said lots and parcels of ground ever since their appropriation for depot and station purposes, connected with the use and operation of the said lines of road. The particular lots and parcels of ground are specifically set forth and described in the list hereto attached, together with a memorandum of the time at which the said lots and parcels of real estate were appropriated, occupied, and used by the said railway companies.

“Your petitioners therefore respectfully make application, under the law passed by the recent legislature, to you as the commissioners of said county to have the said lots and parcels of real estate appraised, and that as a board of appraisers you make the correct value of the same at the time the said lots and parcels of land were taken by the said railroad lines, as provided in law.’

“That in accordance with the said application, the county commissioners, acting as a board of appraisers under said law, did on the 27th day of May, 1887, duly view, inspect, and examine the said parcels of real estate, and did appraise and value the same, and made their report in writing to the county treasurer of Lancaster county, Nebraska, as provided by said law, which report is in words and figures following, to-wit:

“‘LINCOLN, NEB., May 27, 1887.

“‘*To Jacob Rocke, Treasurer Lancaster County, Neb.:*

“‘DEAR SIR—T. E. Calvert, Gen. Supt. C., B. & Q. R. Co., filed a petition in the office of the county clerk asking the county commissioners of Lancaster county, Ne-

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braska to appraise certain lots and parcels of real estate belonging to the state of Nebraska.

“We, the board, by the power vested in us by an act of the legislature, as county commissioners of Lancaster county, Nebraska, having viewed the lots and parcels of real estate as described in the petition and as per statement hereto attached, and the value placed opposite each lot being the value agreed upon by us as the value of said lot as found by us at the time said lots were appropriated, occupied, and used by said railroad companies:

Lot.	Block.	Value.	Lot.	Block.	Value.
1	280	\$31.00	8	72	\$353.00
2	280	28.00	4	270	183.00
3	280	28.00	5	270	183.00
4	280	28.00	6	270	167.00
5	280	25.00	7	8	533.00
6	280	22.00	8	8	483.00
1	281	22.00	4	272	50.00
2	281	17.00	2	278	45.00
3	283	13.00	3	278	45.00
4	283	11.00	4	278	45.00
5	283	19.00	5	278	45.00
6	283	9.00	6	278	45.00
3	284	13.00	7	278	47.00
4	284	13.00	8	278	47.00
5	284	17.00	12	278	50.00
5	279	65.00	11	278	67.00
10	279	68.00	12	279	67.00
			3	267	10.00

“Witness our hands this 27th day of May, 1887.

“H. C. RELLER,

“ALBA BROWN,

“H. H. SHABERG,

“County Commissioners Lancaster County, Neb.

“Attest:

“O. C. BELL,

“Co. Clerk, Lancaster Co., Neb.’

“That in accordance with the appraisement and the report made by the said county commissioners, said railroad companies did, on the 31st day of May, 1887, pay to the county treasurer the amount of said value and appraise-

ment, as made by said board of appraisers, and said county treasurer gave a receipt therefor, and the county clerk of said county transmitted a duplicate to the commissioner of public lands and buildings to be entered on record, as in other cases of payments on educational lands, as provided by said act, which receipt is in words and figures following, to-wit:

“\$2,884.50.

“TREASURER'S OFFICE, LANCASTER CO., NEB.

“LINCOLN, NEB., May 31, 1887.

“Received of the Chicago, Burlington & Quincy Railroad Company, of the Burlington & Missouri River Railroad company in Nebraska, twenty-eight hundred and eighty-four dollars to be applied as pay in full for the following described lots and parts of lots in the city of Lincoln:

Lot.	Block.	Value.	Lot.	Block.	Value.
1	280	\$31.00	8	72	\$353.00
2	280	28.00	4	270	183.00
3	280	28.00	5	270	183.00
4	280	28.00	6	270	1167.00
5	280	25.00	7	8	533.00
6	280	22.00	8	8	483.00
1	281	22.00	4	272	50.00
2	281	17.00	2	278	45.00
3	283	13.00	3	278	45.00
4	283	11.00	4	278	45.00
5	283	9.00	5	278	45.00
6	283	9.00	6	278	45.00
3	284	13.00	7	278	47.00
4	284	13.00	8	278	47.00
5	284	17.00	12	278	50.00
5	279	65.00	11	279	67.00
10	279	68.00	12	279	67.00
			3	267	10.00
		\$419.00			\$2,465.00

“Total.....\$2,484.00

“JACOB ROCKE,

“County Treasurer Lancaster County, Neb.

“Countersigned:

“O. C. BELL,

“County Clerk Lancaster County, Neb.’

"That in compliance with the terms of said act of the legislature, complainants duly filed a plat of said lands and parcels of real estate so taken, with the commissioner of public lands and buildings, on the 1st day of June, 1887, and requesting that he should prepare a deed to be executed by the governor of the state of Nebraska, conveying said land to said companies, and that he should mark the said real estate as sold upon his records.

"That on June 10th, 1887, complainants were duly notified by the secretary of the board of public lands and buildings of the state of Nebraska, that by advice of the attorney general of the state the said commissioner of public lands and buildings, and the said board had decided that said condemnation proceedings were illegal, and that the said board should proceed to sell the said real estate regardless of said condemnation, and refused to prepare and have executed the deed that the said railroad companies were entitled to by virtue of said condemnation proceedings and the payment of the above appraisement as above stated; that complainants are unable to procure said conveyance, the said commissioner of public lands and buildings having refused to prepare the same as provided by said act, and the governor of said state having refused to execute the same, and complainants are remediless at law to save themselves from damages or to compel the conveyance of said lots and parcels of real estate condemned and paid for as aforesaid. Complainants therefore pray that a peremptory writ of mandamus may issue commanding the said defendant, Joseph Scott, as commissioner of public lands and buildings, to forthwith prepare a deed for execution by the governor, as provided by said act of the legislature, and that the governor be required to execute and deliver the same to the complainants, conveying the said lots, lands, and parcels of real estate to the complainants herein, and for such other relief as complainants are entitled to, and for costs."

There is also a stipulation of facts submitted with the petition, as follows:

"It is hereby stipulated and agreed by and between the parties hereto—1st. That exhibit "A," hereto attached, is the original application to have the lots appraised as presented to the board of public lands and buildings by J. W. Deweese, attorney. 2d. It is further agreed that the Chicago, Burlington & Quincy Railroad Company is a foreign corporation, and transfers its suits in court from the state courts to the federal court by reason thereof. 3d. That Art. I. of the consolidation of the C., B. & Q. and B. & M. R. R. Co. in Neb. provides: 'Such consolidation should be effected by a sale, assignment, and transfer *which is hereby made* of the railroad, leasehold rights, and rights of action, contracts, moneys, stocks, franchises, and all other property of every description whatsoever to the C., B. & Q. R. R. Co.'

"T. M. MARQUETT,

"Atty for Plaintiff.

"WM. LEESE,

"Atty for Defendant."

The attorney general demurs to the application upon the ground—*First*, That the relators have not legal capacity to sue; and *second*, That the facts stated in the petition are not sufficient to entitle the relators to the relief prayed for.

The cause was argued and submitted to the court on the 6th day of July, 1887, and on the same day was examined by the court, and a decision agreed upon, the entry made by a member of the court on the consultation room docket being, "July 6th, writ denied." The court thereupon adjourned until the 20th day of September, 1887. On the 2d day of September, 1887, the relators attempted to dismiss said cause by filing in this court the following:

"In the Supreme Court, State of Nebraska.

"The State of Nebraska, on
relation of the Burlington &
Mo. River Railroad Com-
pany in Nebraska and the
Lincoln & Northwestern
Railroad Company,

vs.

Joseph Scott, Com. of Public
Lands and Buildings, and
John M. Thayer, Governor.)

"Now comes the complainant, above named, and vol-
untarily dismisses the complaint, and application for writ
of mandamus, without prejudice, this Sept. 2d, 1887.

"T. M. MARQUETT,

"J. W. DEWEESE,

"Attorneys for Plaintiff."

The attorney general contends that the relator could not
dismiss the case after it had been submitted to the court,
and now asks that the attempt of the relators to dismiss be
disregarded and that judgment be rendered.

Section 430 of the code provides that, "An action may
be dismissed without prejudice to a future action. *First.*
By the plaintiff, before the final submission of the case to
the jury, or to the court, where the trial is by the court.
Second. By the court, where the plaintiff fails to ap-
pear on the trial. *Third.* By the court, for want of nec-
essary parties. *Fourth.* By the court, on the application
of some of the defendants, where there are others whom
the plaintiff fails to prosecute with diligence. *Fifth.* By
the court for disobedience by the plaintiff of an order con-
cerning the proceedings in the action. In all other cases
upon the trial of the action the decision must be upon the
merits."

This section was copied *verbatim* from section 372 of the
Ohio code. The proper construction of that section was be-
fore the supreme court of that state in *Beaumont v. Herrick*,

24 Ohio State, 446, in which it was held that, "Where a case is submitted to the court on a demurrer to the answer, the ground of the demurrer being that the answer does not contain a defense, and the demurrer is overruled, the plaintiff cannot, without the leave of the court, dismiss his action without prejudice. The submission of the case on the demurrer is a final submission of the case within the meaning of section 372 of the code, unless leave is obtained to reply or amend." To the same effect are the following cases: *Burlington R. R. Co. v. Sater*, 1 Clarke, 421. *Dayton v. R. R. Co.*, 11 O. S., 497. *Ditch Co. v. Bradford*, 13 Cal., 637. *Cunningham v. Milwaukee*, 13 Wis., 120. *Livergood v. Rhodes*, 20 Ind., 411. *Heinlin v. Castro*, 22 Cal., 100. *Sweet v. Mitchell*, 19 Wis., 524. *Kenedy v. McNickle*, 2 Brewster, 536. *Harris v. Beam*, 46 Iowa, 118. No case has been cited where under a statute like ours a plaintiff as a matter of right can dismiss his action after it has been submitted to the court. If he could do so litigation would become interminable, because a party who was led to suppose a decision would be adverse to him could prevent such decision and begin anew, thus subjecting the defendant to annoying and continuous litigation. The statute, therefore, limits the right of a plaintiff to dismiss to the final submission of the case. In the case under consideration the relators had set forth all the facts upon which they relied for the writ and the case was finally submitted to the court, which determined that the facts were not sufficient to entitle the relators to the relief prayed for. The motion to dismiss, therefore, was unavailing, and the judgment rendered July 6th denying the writ will now be entered of record.

This action was brought under Art. XI., Ch. 72, Comp. Stat. of 1887, which provides as follows:

Sec. 1. "Any railway company incorporated under the laws of this state, which shall have constructed its railway, or located, or hereafter may construct and locate, its

grounds for stations, machine shops, depot grounds, turn-outs, sidetracks, warehouses, and other appurtenances to a railroad, incident to its organization, across or on any state lands, as provided by section 105 of chapter 16 of the Compiled Statutes of Nebraska of 1885, may apply in writing to the board of public lands and buildings for a valuation and conveyance thereof, filing with such application a plat and description of such lands."

Sec. 2. "On such application being made the commissioner of public lands and buildings shall cause a copy of such application and plat to be forwarded to the chairman of the board of county commissioners, or supervisors of the county where such lands lie, and it shall be the duty of such county commissioners, or a majority of them, or if the county is under township organization, three of the supervisors to be designated by said board of supervisors, or a majority of such designated supervisors, to view the lands so desired to be purchased by such company, and return a true and correct value of such land, under oath, the material facts in which return shall be communicated to such board of county commissioners or supervisors, and entered of record in their proceedings."

Sec. 3. "After the foregoing proceedings have been had the applicant to purchase shall, within ninety (90) days after such appraisement, pay to the state treasurer the appraised value of such lands, and shall then be entitled to receive the deed for the same upon forwarding the proper evidence of such appraisal and receipt of the state treasurer to the commissioner of public lands and buildings; *Provided further*, That the damage accruing to any occupant or owner, or other person who may reside or have improvements on said land previous to the filing of such plat or the appraisement of such damages, shall be paid by said railroad company, such damages to be determined either by mutual agreement between the party so owning or occupying said lands and such railway company, or by appraisement as in other cases."

It will be observed that the right to condemn real estate for right of way under this statute is restricted to corporations organized under the laws of this state. The C., B. & Q. R. R. Co., therefore, being a foreign corporation possesses no rights under the statute. But the C., B. & Q. R. R. Co. is not entitled to the relief prayed for because of another reason.

Sec. 8, Art. XI. of the Constitution provides that, "No railroad corporation, organized under the laws of any other state, or of the United States, and doing business in this state, shall be entitled to exercise the right of eminent domain, or have power to acquire the right of way or real estate for depot or other uses until it shall have become a body corporate pursuant to and in accordance with the laws of this state."

This section absolutely prohibits a railroad corporation organized under the laws of any other state from acquiring the right of way or real estate for depot or other uses until it has become a body corporate under the laws of this state. Stronger language could scarcely be used. This question has never before been presented to this court.

In *Deitrichs v. L. & N. W. R. R. Co.*, 13 Neb., 361, the question presented was whether the lessor or the lessee was entitled to exercise the right of eminent domain, and it was held that the lessor—the owner of the road—was the party entitled to exercise the right. In that case the L. & N. W. R. R. Co. was the lessor, a corporation organized under the laws of this state.

The question was again before the court in *Gottschalk v. L. & N. W. R. R. Co.*, 14 Neb., 389, and the ruling in *Deitrichs v. L. & N. W. R. R. Co.*, 13 Neb., 361, was adhered to. The undeviating rule adopted by this court is, not to discuss the constitutionality of a statute unless the question fairly arises in the case, and in no case heretofore presented to this court has the right of a foreign corporation doing business in this state to condemn right

of way or to acquire real estate for other uses been presented. It is apparent, however, that such foreign corporation possesses no such rights. Our laws are liberal in promoting the organization of railroad companies and the construction of railways in the state. But such corporations must be under our own laws—the creature of our statutes and not of the laws of other states. It will be observed that in each application for the condemnation of the lots above described the C., B. & Q. and the L. & N. W. R. R. Co. are joined as relators. That the C., B. & Q., being a foreign corporation, is debarred from the right to the relief prayed for was conceded by one of the attorneys for that corporation on the argument. That matter may, therefore, be dismissed; but can it take as lessee of the L. & N. W. R. R.? The constitution declares that it shall not acquire right of way or real estate for depot or other uses. If it cannot acquire these, it can not take by lease or other means. It cannot do by indirection what it is absolutely prohibited from doing directly. To be entitled to relief it must organize under the laws of the state.

The demurrer to the petition is therefore sustained, and the proceedings dismissed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

23 644
24 301
24 772

22 644
27 109

22 644
30 436

22 644
36 297

22 644
42 494
43 871

22 644
47 318

22 644
c49 108

c49 251

22 644
56 363
56 494

22 644
f59 348

**FRANKLIN W. BROOKS, PLAINTIFF IN ERROR, V. ABBIE
E. DUTCHER, DEFENDANT IN ERROR.**

1. **Slander: ISSUES: EVIDENCE.** In an action for damages for defamation of character, when the speaking of the words are admitted and their truth alleged in justification, it is error without prejudice to permit a witness to testify to the speaking of words of substantially the same meaning and import, and give as his understanding of the words used the same meaning as is charged in the petition and justified in the answer, that issue being settled by the pleadings.
2. **Error Without Prejudice.** Error cannot be predicated upon the ruling of a trial court admitting or excluding immaterial testimony, when it is apparent that no prejudice could result to either party, whatever the ruling might be.
3. **Evidence: REPUTATION.** When a witness is called for the purpose of testifying to the general reputation of a party for chastity, his examination-in-chief should be confined to general reputation, and not as to what particular persons, or how many, the witness may have heard speak of the person whose reputation is sought to be attacked.
4. **Instructions: EXCEPTIONS.** A general exception to instructions given is insufficient. Each specific instruction which is claimed to be erroneous must be distinctly pointed out and specifically excepted to.
5. **Evidence examined, and Held,** To sustain the verdict.
6. **A New Trial** will not be granted on the ground of newly discovered evidence, when such evidence is merely cumulative.
7. **Damages awarded by the jury, Held,** To be excessive.

ERROR to the district court for Holt county. Tried below before TIFFANY, J.

M. P. Kinkaid (Cleveland & Meals with him), for plaintiff in error.

M. F. Harrington and B. L. Snow, for defendant in error.

REESE, J.

The petition in this case alleged that on or about the 14th day of December, 1885, at the village of Atkinson, Holt county, Nebraska, plaintiff in error, with the intent and purpose of injuring defendant in error, and in a certain conversation which he had concerning her in the presence and hearing of a number of persons, falsely and maliciously did speak and publish certain defamatory words, by which he charged defendant in error with being a woman of bad character for chastity. The particular allegation of the petition being, that in said conversation he made use of the following language: "She," meaning the plaintiff, "is a whore." That she is a married woman, and that she sustained damages in the sum of \$5,000.

Plaintiff in error filed an answer to this petition, by which he alleged the truth of the charge claimed to have been made by him.

The cause was tried to a jury and resulted in a verdict in favor of plaintiff, and assessing her damages at the sum of \$3,000. A motion for a new trial was made, which being overruled, judgment was rendered upon the verdict, and plaintiff brings error to this court.

At the commencement of the trial no question was presented to the court as to the order of trial and the introduction of testimony, or upon whom devolved the burden of proof; defendant in error assuming the burden, and proceeding with the trial as though the allegations of the petition were denied. Defendant in error was first placed upon the stand, but as no question is presented with reference to her testimony, it will not for the present be noticed.

The first question presented by the brief of plaintiff in error is, as to the examination of one F. E. Havens, a witness sworn upon the part of the plaintiff. The objection is, that the witness was improperly permitted to testify as to what his understanding of the language used by plaintiff

in error was—his answer being, “I understood from his language that she was a very bad woman—she was a whore.” It was contended that the testimony was improperly received over the objection of plaintiff in error, and that the witness should be confined to a statement of the language used by plaintiff in error, instead of giving his understanding of what that language imported. It is not necessary to inquire here whether this testimony would have been competent under conditions other than those presented at the time of the trial. The allegations in the petition were, that in that conversation plaintiff in error charged defendant in error with being a prostitute. This allegation being admitted, and the truth of the charge alleged by the answer, disposes of any necessity of proving that the charge was made. The answer of the witness being simply that he understood from the language used that plaintiff in error intended to convey a meaning which he by his answer, and by his whole defense upon the trial, says he did intend to convey, and which he alleged was true, could not be of any possible prejudice to him, even if erroneous, and, therefore, the judgment could not, for that reason, be reversed.

The same observation may be made as to the testimony of the witness Brady, in which he details a conversation with plaintiff in error, whereby he informed the witness that the house of plaintiff, being a hotel, was a very unsafe place to stay, owing to the fact that plaintiff and her husband were liable to try to “put up a job” on those who might go there. The question was asked, what kind of a “job”? His answer was, “To get her to sleep with him, as I understood him in his conversation.”

I. F. Moon, being called as a witness, testified as to conversations had with plaintiff in error, and as to charges made by him against the chastity of defendant in error, and of his efforts to procure others to go to her house for the purpose of soliciting illicit intercourse with her, or as was

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expressed by the witness, "Of testing her character." On cross-examination, the witness was asked if he knew the general reputation of the house kept by defendant in error about the time of the commencement of this action? He answered, "I do not." He was then asked to state if he did not, several times before the commencement of this action, ask Mr. Brooks (plaintiff in error) if he was getting much down at the Commercial House when he was boarding there? This was objected to as incompetent and immaterial, and the objection was sustained. This ruling of the court is now assigned for error.

We can see no error in the decision. The answer, whether in the affirmative or negative, could have had no effect upon the cause, or tend either one way or the other to increase or diminish plaintiff's defense. It was shown by the testimony that plaintiff in error had boarded at the house of defendant in error. The conversation as detailed by the witness showed that charges of unchastity were very frequently made against her by plaintiff in error. The simply asking of the question was wholly unimportant, and the answer of plaintiff in error thereto could not, in any view of the case, have been admissible. The ruling was therefore correct.

One James Cross was called as a witness by plaintiff in error in his defense, and testified in substance that about five years before the trial he boarded with defendant in error in the village of Bazile Mills; that upon one occasion during the absence of the husband of defendant in error, he came into the house, and was reading a paper; that she came in, sat down by him, and began to "knock" her knees against his, when he pinched them, and that she threw the bedroom door open, went in and laid down upon the bed; that he went into the room where she was lying, and made an improper proposal to her, which was resented with considerable force by her, the language of the witness being, "She kicked"; that the

next morning when he went to breakfast she asked him what he would give her to settle it, and not say anything to her husband about it, and that he told her he would not give her anything. The question was then asked, if he stated why he would not? This was objected to as incompetent and immaterial, and the objection was sustained. He was then asked to state the conversation in reference to the matter of settlement, and upon objection being made the testimony was excluded. The rulings of the court were excepted to and are assigned for error.

The issues presented by the pleadings were as to the truth or falsity of the charge of unchastity made by plaintiff in error. The witness Cross was evidently introduced for the purpose of sustaining this charge. It was competent, for that purpose, for him to testify to any facts which would tend to prove the defense. This he did without objection, but it was wholly immaterial to inquire as to what reasons he may have offered, or as to what might have occurred at a subsequent time, having no reference to the question under inquiry. Plaintiff in error offered to prove by the witness that a warrant was issued by the procurement of defendant in error; that he was pursued by an officer and arrested in Dakota territory, and compelled to pay \$50.00 and the costs of prosecution in order to avoid arrest. But no proof was offered, even had it been competent, to show any connection of defendant in error with the alleged settlement, and of which she had previously testified she had no knowledge.

One John Williamson was called as a witness for plaintiff in error and interrogated as to the general reputation of defendant in error for chastity while she resided in Creighton, some four years prior to the time of the trial; and upon being asked if he was acquainted with her general reputation for chastity in the town and vicinity of Creighton, his answer was, that he did not think he had ever heard "most of the people say anything about it." He was

again requested to answer, by saying "Yes" or "No," as to whether he was acquainted with such reputation. His answer was, "I would have to say no, because I have never talked with most of the people." He was then asked what the "community at large, in the town of Creighton, said as to the reputation of this woman as to chastity?" His answer was, "I could not answer that, because I had enough to look after without that." He was then asked, "What did the people generally consider this woman to be? Did you know what her general reputation was for chastity at the time you lived there?" His answer was, "I don't know as I know of my own accord at all." Defendant in error then objected to the witness testifying, because he was incompetent to testify, and the objection was sustained, but no exception was taken. He was then asked to state if he knew anything of his own knowledge in regard to her character for chastity at the time she lived at Creighton. His answer was, "I do not." Upon being questioned as to his knowledge of her general reputation at the town of Atkinson, where she resided at the time of the trial, witness answered that he knew nothing of her reputation while at Atkinson, except what he had heard outside of the town. He was then asked what he had heard coming from the parties that had resided at Atkinson. Objection was made upon the ground that the witness had not shown himself competent, and the objection was overruled. Without requiring an answer to this question from the witness, plaintiff in error then offered to prove by him that he had heard various parties residing in the town of Atkinson talk about the reputation of defendant in error as to chastity. No objection was made, and no ruling had. The next question propounded was, "How many persons have you heard speak upon the question of her chastity residing in the town of Atkinson?" This was objected to as incompetent, and objection was sustained, and for the first time during the examination of the witness

an exception was noted. It is clear that the witness had not shown himself competent to testify upon the subject of the general reputation of defendant for chastity in the community in which she had, or then resided. That being true, as was evidently conceded by plaintiff in error by the course of the examination, it became incompetent to interrogate him as to how many persons he had heard speak upon the question of her chastity while residing in the town of Atkinson—First, by reason of the witness's previous declaration that he knew nothing at all upon that subject; and second, by the well known rule that when a witness is called for the purpose of impeachment, his testimony must be confined to the general reputation of the person sought to be impeached, leaving to the cross-examination the matter of testing his knowledge of such reputation.

Objection is made to the instructions given to the jury by the trial court. The instructions are somewhat lengthy, and written in consecutively numbered paragraphs, as required by section 55 of chapter 19 of the Compiled Statutes. No exception was taken to any of them, but at the close the following memorandum is made, to-wit, "The defendant excepts to each and every one of the above instructions separately." These exceptions are clearly insufficient to permit an examination of the instructions.

In *Dodge v. The People*, 4 Neb., 220, a similar question was presented to this court, and in the opinion, written by the present chief justice, the following language occurs: "The plaintiff excepted to the instructions given by the court on its own motion in these words: 'To this charge, and every part thereof, the defendant then and there excepted.' This is a general exception. The rule is well settled in this court that each specific portion of instructions which is claimed to be erroneous must be distinctly pointed out and specifically and pointedly excepted to. *McReady v. Rogers*, 1 Neb., 124. *Strader v. White*, 2 Id., 360. *Schryver v. Hawkes*, 22 Ohio State, 308."

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In *Strader v. White*, it appears that the ground of error alleged was, "That the court erred in the charge and instructions given to the jury on the trial of said action." In the opinion written by Judge Lake, it appears that the exception to the instructions was as follows: "To the giving of such charge and instructions by the court, the defendants, F. E. and G. F. White, by their counsel, except." In writing the opinion, he says: "Now there are several propositions of law contained in this instruction to which no objection is urged, and which it is conceded state the law correctly. Where this is the case, it is well established in practice that a general exception to the whole charge will be unavailing, even though some of the propositions contained in it be untenable. Each specific portion which is claimed to be erroneous must be distinctly pointed out and specifically excepted to." See also, *Nyce v. Shaffer*, 20 Neb., 507. *Weir v. B. & M. Railroad*, 19 Id., 212. Maxwell's Pleading and Practice, 432, note.

As has been often said by this and other courts, common fairness to a trial court requires that his attention should be called to the objectionable instructions, if any, by an exception thereto, in order that such error may be corrected before the cause is finally submitted to the jury. It seems to be conceded that a part of the instructions given correctly state the law. The general exception was therefore unavailing.

It is next insisted that the verdict is against the clear weight of the testimony. We have carefully examined all the testimony in the case, and cannot so hold. There was sufficient to sustain the finding of the jury that, prior and at the time of the speaking of the slanderous words, defendant in error with her husband was occupying a building known as the Commercial Hotel, in the village of Atkinson, owned by, and under a lease from, plaintiff in error; that at that time the reputation of defendant in error for chastity was not questioned in the community in which she

resided; that some difficulty arose between plaintiff and defendant, and that plaintiff conceived the idea of terminating the lease; that in order to do so he circulated the report against her chastity, the result of which would be to diminish the patronage of the house and render it unprofitable to the tenants; that actions were instituted for possession of the property, in which plaintiff was unsuccessful; that he sought to array the citizens of the village against defendant by the insinuation that such an establishment as the house occupied by her should not be tolerated by the community, and that defendant's character for chastity was, prior to that time, good.

It is true that the testimony upon the question of her chastity was somewhat conflicting; yet there was not only sufficient to warrant the jury in finding the charge was untrue, but that it was maliciously made. In a case of such a conflict as is here presented, the jury must be the sole judge of the weight of the testimony and of the credibility of the witnesses. The verdict cannot for that reason be molested.

Upon the hearing of the motion for a new trial a number of affidavits were submitted by which newly discovered evidence was sought to be shown. These affidavits were not copied by the clerk in making up the record, but the originals are included in the transcript, some of which are legibly written, others are not. These affidavits may be disposed of generally, by the remark that all the testimony which it is claimed was discovered was cumulative, bearing directly upon the propositions or questions submitted to the jury upon the testimony of the witnesses examined on the trial. The particular defense presented being the truth of the alleged slanderous words, the principal testimony introduced upon the trial by plaintiff in error was for the purpose of establishing that defense. Among the witnesses examined we will mention John G. Williamson, James Cross, W. R. Williams, and William F. Jamison.

The witness Williamson testified as follows:

"Q. State, if you know anything, of your own knowledge, in regard to her character for chastity, at the time she lived in Creighton? A. I do not."

After the verdict an affidavit was filed by him, in which he sets out his knowledge of facts concerning the general reputation of defendant in error for chastity during her residence in Creighton, and also during her residence in Atkinson, which is in language not proper to be here quoted. This alleged newly discovered testimony must have been known by him at the time he testified, and if true he must have testified falsely in order to avoid its narration, or his affidavit was an after-thought.

The witness Cross testified that he knew the general reputation of defendant in error for chastity at the time she lived in Creighton, and that it was bad, and therefore the whole weight of his testimony upon that question was before the jury, and which they seemed not to have believed. In his affidavit he states that one George Davis, of Morrelville, Knox county, Nebraska, and one Schlater, who resided in Creighton, in the same county, had given him certain information as to what they had seen and heard concerning defendant in error. The affidavits of those two gentlemen were not presented, and therefore the affidavit of Cross, being hearsay, is not credited. Hilliard on New Trials, 514.

W. R. Williams was introduced as a witness for the defense. On his direct examination he was asked the following question: "Are you acquainted with the general reputation of the plaintiff in this action, as to her chastity, in the community in which she lives?" To which he made answer, "No, I ain't acquainted." After the verdict was rendered, he made an affidavit, which was attached to the motion for a new trial, in which he stated that he resided in the town of Atkinson, and that in the year 1885,

and prior to the commencement of the suit, he was acquainted with the defendant in error, and that he heard a great number of men, other than defendant's husband, say, within a year prior to the filing of the affidavit, that they had had sexual intercourse with her. If this was true his testimony must have been corruptly false, for if he had been sufficiently acquainted with the reputation of defendant in error as to have heard "a great number of men" say they had sexual intercourse with her, this would have been sufficient to have justified him in answering that he was acquainted with her reputation for chastity; especially so when the number of inhabitants of the village of Atkinson at that time is taken into consideration. In addition to this, the witness, apparently not satisfied with the discrepancy existing between his affidavit and his testimony, voluntarily disgraced himself by saying, under oath, that he had had intercourse with the defendant, for which he paid the sum of \$2. In addition to the fact that the facts stated in the affidavit would be simply cumulative and not ground for a new trial, a fair insight into the character of this witness is given by his apparent willingness to make public the fact of his own perjury and his own shame.

Upon this whole question of newly discovered evidence it must be sufficient to say generally, that a new trial will not be granted upon the ground of newly discovered evidence, when such evidence is merely cumulative, unless the new evidence is sufficient to render clear what was before doubtful. *Bokar v. Williams*, 14 Neb., 389. *Schreckengast v. Ealy*, 16 Id., 510. *Halliday v. Briggs*, 15 Id., 219. *Scofield v. Brown*, 7 Id., 224. Applying this rule construed in its most liberal form for plaintiff in error, it is quite evident that should all the witnesses whose affidavits are presented appear in court and testify to the competent facts therein stated, and be contradicted as they are by the testimony of other witnesses, no different result

could be obtained growing out of such testimony. It carries upon its face the blemish of being either false, or given by persons destitute of all the nobler instincts of our common humanity, and, therefore, in no degree entitled to credit. There was no error, therefore, in the decision of the district court in overruling the motion for a new trial on the ground of newly discovered evidence.

After the testimony had been closed, and each party had rested, plaintiff in error asked the "privilege under the pleadings to have the opening and closing to the jury." Upon objection by defendant in error, the request was refused, to which plaintiff in error excepted, and of which he now complains. In this there was no error. The order of trial in this respect is fixed by section 283 of the civil code, the *sixth* clause of which is: "The parties may then submit or argue to the jury. In the arguments, the party required first to produce his evidence shall have the opening and conclusion." From the record it appears that defendant in error first produced her evidence. This was without objection from plaintiff in error, and he must be held to have consented to the order of trial. See also *Vifquain v. Finch*, 15 Neb., 505.

The next contention of plaintiff in error is, that the damages awarded by the verdict are excessive and were given under the influence of passion and prejudice. We can see nothing in the record which would indicate that the verdict was the result of either passion or prejudice, and it would not for that reason be molested. But we are of the opinion that, in the estimation of the damages, the jury failed to take into consideration some elements which they should have considered, and for that reason the verdict is greater than was warranted under all the circumstances of the case, as proven by the evidence on the trial. For this reason the judgment of the district court will be reversed and a new trial granted, unless the defendant in error file a remittitur of one thousand dollars within thirty days from

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this date. In case such remittitur is filed the judgment of the district court will be modified and affirmed for the sum of two thousand dollars.

JUDGMENT ACCORDINGLY.

THE other judges concur.

22	656
25	88
22	656
46	887
22	656
47	797
22	656
58	214

JOSEPH P. HAYS, APPELLANT, V. THOMAS MERCIER ET AL., APPELLEES.

1. **Appeal: MOTION FOR NEW TRIAL: BILL OF EXCEPTIONS.**

Where plaintiff filed his petition in equity in the district court, and to which defendant presented a demurrer, the ground of demurrer being that the petition did not state the facts sufficient to constitute a cause of action, and such demurrer being sustained, it was held that neither a motion for a new trial nor bill of exceptions was necessary in order to obtain a review in the supreme court by appeal.

2. **Mechanic's Lien: AFFIDAVIT.** An affidavit for a mechanic's lien in the following form:

"STATE OF NEBRASKA, } ss.
CHASE COUNTY.

"J. P. Hays, being first duly sworn, on his oath says, that the foregoing account of work, labor, and skill is a true and correct account of the work, labor, and skill done and performed and furnished by this affiant for the said Thomas Mercier, under a verbal contract for the erection of a storehouse building for the said Thomas Mercier, upon the following described lot, piece, or parcel of land, viz.: Lot number one in block number four in the town of Imperial, Chase county, Nebraska, according to the recorded plat and survey of said town, now of record in the office of the county clerk of said county. And this affiant further says that he has and does hereby claim a lien on the said premises as above described for the full amount of his said account for labor, work, and skill, to-wit, the sum of \$161.50, together with interest thereon at the rate of 7 per cent per annum from this date, and further affiant says not." *Held*, Sufficient when assailed by demurrer.

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APPEAL from the district court of Chase county. Tried below before COCHRAN, J.

C. W. Meeker (*E. W. Metcalfe* with him), for appellant, cited: *Griggs v. LePoidevin*, 11 Neb., 385. *Hardy v. Miller*, Id., 395. *Bourgette v. Hubinger*, 30 Ind., 304. *Great Western Mnf. Co. v. Hunter Brothers*, 15 Neb., 32. *Doolittle v. Plentz*, 16 Id., 153. *Peck v. Hensley*, 21 Ind., 344. *Manly v. Downing*, 15 Neb., 637. *Kneeland Mechanic's Lien*, Sec. 269.

Henry F. Williams, for appellees, cited: *Kneeland*, 27, 221. *Grant v. Vandercook*, 57 Barb., 165. *Muldoon v. Pitt*, 54 N. Y., 269. *Anderson v. Knudsen*, 33 Minn., 172. *Rugg v. Hoover*, 28 Id., 404. *Davis v. Livingston*, 29 Cal., 283.

REESE, J.

This action was commenced in the district court of Chase county, and was for the foreclosure of a mechanic's lien. The action is against Thomas Mercier, as owner of the property, and Mary J. Mercier. John M. H. Hooker and Hannibal H. Whitman are made defendants, as owners of some interest in the property. Hooker filed his separate answer setting up a mechanic's lien as sub-contractor. Thomas Mercier and Mary J. Mercier filed a general demurrer to the petition. The demurrer was sustained and plaintiff's cause dismissed, from which he appeals to this court.

Since the filing of the case in the supreme court, Thomas and Mary Mercier appeared specially, and filed their objections to the jurisdiction of the court. This objection is based upon four alleged causes: "*First*. No exception was taken to the decision of the court in which the cause was tried at the time the judgment was rendered, nor at any time. *Second*. No bill of exceptions is on file in this cause.

Third. No relief was asked by appellant in the district court. *Fourth.* No motion for a new trial was filed in the district court."

As to the first exception, that no exception was taken to the decision of the court, we find it is not sustained by the record, from which we quote the following: "This cause having been submitted to the court on the demurrer to the petition, on consideration thereof the court does sustain the same so far as it relates to the mechanic's lien, and the plaintiff not desiring to prove his claim as to the account set up in the said petition, and not desiring to amend his petition, it is ordered by the court that said action be dismissed, and that defendant recover from the plaintiff his costs herein expended and taxed at \$7.33, to all of which ruling of the court in sustaining said demurrer plaintiff then and thereupon duly excepted." This was sufficient.

As to the second ground of objection, that there is no bill of exceptions filed in this case, it must be sufficient to say that none is required.

The third ground of objection is not sustained by the record. It can serve no important purpose to quote the petition at length, but we find in it the allegation of the essential facts, the usual prayer for an accounting, and that the "amount found due be declared a lien upon the property described, in case the amount found due is not paid within a time to be fixed by the court, that the premises be sold, and the proceeds be applied to its payment, and such other and further relief as equity and justice may require."

As to the fourth ground, no motion for a new trial was necessary.

The objection to the jurisdiction of the court is, therefore, overruled.

The allegations of the petition filed in the district court were to the effect that plaintiff had performed certain work for defendant in the construction of a building upon lot one in block four in the original town of Imperial; that

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the total value of the services rendered was \$411.18; that there had been paid thereon the sum of \$249.61; that a balance of \$161.57 remained unpaid. It was alleged that this work was performed under and by virtue of a verbal contract with the defendant, the owner of the building, for the same, and that the necessary affidavit had been filed in the office of the county clerk by which to perpetuate the lien. The petition seems to contain all the averments which could be required in a case of this kind. But it is claimed that the affidavit for the mechanic's lien, filed in the office of the county clerk, was insufficient. This affidavit is as follows:

"STATE OF NEBRASKA, }
CHASE COUNTY. } ss.

"J. P. Hays, being first duly sworn, on his oath says that the foregoing account of work, labor, and skill is a true and correct account of the work, labor, and skill done and performed and furnished by affiant for the said Thomas Mercier, under a verbal contract for the erection of a storehouse building for said Thomas Mercier upon the following described lot, piece, or parcel of land, viz.: Lot number one in block number four in the town of Imperial, Chase county, Nebraska, according to the recorded plat and survey of said town now of record in the office of the county clerk of said county, and that this affiant further says that he has and does hereby claim a lien on the said premises as above described for the whole amount of his said account for labor, work, and skill, to-wit, the sum of \$161.57, together with interest at the rate of 7 per cent per annum to this date, and further affiant says not."

This affidavit is subscribed and sworn to in the usual form. The account is attached to the affidavit showing the debits and credits thereon.

As we understand the case presented, defendant offers but one objection to the affidavit, and that is, that it is not alleged therein that Thomas Mercier was the owner of the

property upon which the labor was bestowed. The recitals of the affidavit are, that the labor was furnished to said Thomas Mercier, under a verbal contract for the erection of the storehouse building for said Thomas Mercier upon the lot therein described. As has been frequently said by this court, the mechanic's lien law of this state is a remedial statute, and must be liberally construed in furtherance of justice. The demurrer admitted all the material allegations of the petition, the ownership of Mercier being therein alleged is admitted of record, and the only question to be here considered is whether or not, as between the parties to the contract, it is necessary that the affidavit by which a lien is sought to be perpetuated should contain the averment that the person with whom the contract was made and for whom the labor was performed was the owner of the property against which the lien is sought to be established.

Section 3 of chapter 54 of the Compiled Statutes of 1885, entitled "Mechanics' and Laborers' Liens," is in part as follows: "Any person entitled to a lien under this chapter shall make an account in writing of the items of labor, skill, machinery, or materials furnished, or either of them as the case may be, and after making oath thereto, shall, within four months of the time of performing such labor and skill, or furnishing such machinery or material, file the same in the county clerk's office of the county of which such labor, skill, and materials shall have been furnished, which account so made and filed shall be recorded in a separate book to be provided by the clerk for that purpose, and shall from the commencement of such labor or the furnishing of such materials for two years after the filing of such lien, operate as a lien on the several descriptions of such structures and buildings and the lots on which they stand, as in the first section in this chapter named."

While it would no doubt be good practice in an affidavit for a mechanic's lien to make the direct averment that the

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person with whom the contract was made was the owner of the property, yet we find nothing in the statute which would require a technical averment as to such ownership. The language of the law is, "that the person entitled to a lien shall make an account in writing of the items of his labor, skill, machinery, or materials, and after making oath thereto," that is to the account, "shall file the affidavit," or rather the account so verified, "in the office of the county clerk." It is true that the allegation of ownership is an essential averment to the maintenance of the action. But this averment, in our opinion, is required only in the petition for the foreclosure of the lien. The petition in this case contains all necessary averments upon this subject. To the petition alone, then, when assailed by demurrer, must we look.

While it is not our purpose to dispose of this case on that ground, yet we feel inclined to remark, that the question here presented cannot properly arise upon demurrer, but must be a question of the admissibility of the evidence upon which the lien is sought to be foreclosed. Waiving this consideration, however, we hold that the affidavit was sufficient, and the demurrer should have been overruled.

The judgment of the district court is reversed, and the cause is remanded for further proceedings according to law.

REVERSED AND REMANDED.

THE other judges concur.

ELMER ANSLEY, APPELLEE, v. C. F. PASAHRO, MARY PASAHRO, TEMPLETON BROS., AND W. C. VANGUNDY, APPELLANTS.

1. **Vendor's Lien.** A vendor of real estate, upon the absolute conveyance thereof by deed, has no lien on the land so conveyed for such portion of the purchase money as remains unpaid. *Edminster v. Higgins*, 6 Neb., 265.
2. ———. The policy of our law is to discourage secret liens, and to require all instruments affecting title to real estate to be entered upon record. *Id.*
3. ———. The doctrine that the vendor has a lien on the land conveyed for purchase money remaining unpaid is repugnant to our statutes in relation to real estate, and is no part of the law of this state. *Id.*
4. ———: **RULE APPLIED.** A. sold and deeded certain real estate to P. on the 29th day of June, 1885. On the same day T., by virtue of a contract with P. therefor, sold and delivered to him material for the erection of a building on said property. On the 23d day of July, 1885, P. and wife executed a mortgage to A. to secure the unpaid part of the purchase price. *Held*, That the mechanic's lien in favor of T. was superior to the lien of A. created by the mortgage.

APPEAL from the district court of Nuckolls county.
Heard below before MORRIS, J.

Case & McNeny, for appellants Templeton Bros., cited: *Jones on Mort.*, Sec. 1474. *Short v. Nooner*, 16 Kan., 220. *Webb v. Hoselton*, 4 Neb., 313. *Lyon v. McGuffey*, 45 Am. Dec., 675.

W. A. Bergstresser, for appellee, cited: *White Lake Lumber Co. v. Stone*, 19 Neb., 402. *Jackson v. Austin*, 15 Johns., 477. *Boone on Mortgages*, Sec. 75. *Clark v. Butler*, 32 N. J. Eq., 664. *Campbell's Appeal*, 36 Penn. State, 247. *Lyle v. Ducomb*, 5 Binn., 585.

REESE, J.

This action was instituted in the district court of Nuckolls county for the purpose of foreclosing a mortgage executed by defendant Pasahro to plaintiff Ansley upon certain real estate described in the petition. Defendants Templeton Brothers and VanGundy were made parties to the action for the reason that they had filed in the proper office statements for mechanics' liens which they claimed against the premises for material furnished Pasahro, in the construction of a barn. There is no question presented as to the foreclosure proceedings so far as the mortgage is concerned, Pasahro and wife making default in the court below. Templeton Brothers appeared and answered, setting up their mechanic's lien, and alleged that it was superior to the lien of plaintiff's mortgage.

It appears from the record that Ansley sold and deeded the property in question to Pasahro on the 29th day of June, 1885. On the same day Pasahro entered into a contract with Templeton Brothers for lumber with which to make the improvement on the premises. On the 23d day of July of the same year, Pasahro and wife executed the mortgage to Ansley which is now sought to be foreclosed, the consideration of the mortgage being the unpaid part of the purchase price of the property.

On the trial the court found that the lien of the mortgage was superior to the lien created by the mechanic's lien, and rendered a decree accordingly. From this decree Templeton Brothers appealed.

I think the only question which can be considered is, whether or not the furnishing of material for the construction of the barn after the execution of the deed from Ansley to Pasahro, and before the execution of the mortgage from Pasahro to Ansley, would constitute Templeton Brothers the holders of the prior lien, or whether the fact

that the mortgage was given for the purchase price would entitle the mortgagee to priority.

On the trial of the case the following proceedings were had, as shown by the bill of exceptions: "The plaintiff introduced deed record book 'K,' page 522, thereby showing a deed from Elmer Ansley and wife to C. F. Pasahro, a copy of which is hereto attached, marked exhibit 'A.' Also page 495 of mortgage record book 8, showing mortgage from C. F. Pasahro and wife to Elmer Ansley, a copy of which said mortgage is hereto attached marked exhibit 'B.'

"It is agreed in open court that the mortgage above referred to is for the purchase money of said premises. Plaintiff rests.

"Defendant Templeton Brothers then introduced page 44, volume 1, of mechanics' lien record, of said county, showing mechanic's lien filed, *Templeton Brothers v. C. F. Pasahro*. Copy thereof is hereto attached, marked exhibit 'C.'

"It is admitted that the lumber described in said mechanic's lien was used for the erection of a barn on said premises."

This is the whole of the bill of exceptions, with the exception of the exhibits referred to, which are in the usual form and need not be here copied.

By the journal entry of the decree it is shown that Pasahro and wife made default, and the case was tried upon the petition of plaintiff, and the answer of Templeton Brothers.

The finding of the court, as contained in the record, is as follows: "The court finds that C. F. Pasahro and wife, Mary Pasahro, executed and delivered to plaintiff the mortgage deed, set forth in said petition, upon the following described real estate, to-wit: Lots one, two, and three, in block forty-six, in the village of Superior, Nuckolls county, Nebraska, according to the original plat

and survey thereof, as the same appears of record, in Nuckolls county, Nebraska, and that said mortgage was duly recorded on the 30th day of July, A.D. 1885, in book 8 of records of mortgages, page 495, in said Nuckolls county, Nebraska, and the court further finds that said mortgage was given to secure the payment of six several promissory notes, five each for the sum of \$300.00, and one for the sum of \$200.00. The court further finds that the said notes and mortgage were given by the said C. F. Pasahro and Mary Pasahro to secure the unpaid part of the purchase money for said premises in said petition and mortgage described. The court further finds that there is due to plaintiff Elmer Ansley from defendant C. F. Pasahro, the sum of \$970 on three of the promissory notes described in said mortgage and petition, drawing ten per cent interest. The court further finds that secured in this same mortgage are three several promissory notes, being three of the six heretofore described of date of July 23, 1885, and one becoming due June 29, 1886, for the sum of \$300, drawing interest at ten per cent from date, and one to become due September 29, 1886, for \$300, drawing ten per cent interest from date, and one becoming due December 29, 1886, for the sum of \$200, drawing ten per cent interest from date; and that these several sums due and to become due are part of the purchase money of the land described in the said petition and mortgage, and that the same is the first and best lien on said premises. And the court finds due to Templeton Brothers from defendant Pasahro, for materials furnished, and for which mechanic's lien is filed, the sum of \$301.73. And the court finds due defendant VanGundy from Pasahro the sum of \$15 for material furnished, and for which a mechanic's lien has been duly filed, and these materials were used in the construction of a barn on said mortgaged premises, and that the mechanics' liens are second and inferior to the mortgage."

We are thus specific in the presentation of the evidence and the findings of the court, for the reason that it is said in the brief of appellee that, "It also affirmatively appears that the deed was delivered on the 23d day of July, 1885, and the mortgage, set out in the petition, was executed and delivered on the same day." We have examined the record carefully, and cannot find that this statement is borne out by the evidence. The contract for the purchase of the material of Templeton Brothers, made by Pasahro, was on the 29th day of June, the date of the execution of the deed, and more than half the lumber was furnished on that day. The presumption would be quite natural that Pasahro was in possession of the property at that time, and that his possession was under and by virtue of his purchase from Ansley, the deed bearing date of that day. If this is true, the only question presented is, whether or not Ansley would have a vendor's lien as against third parties without notice for the remainder of the purchase price. If not, Templeton's mechanic's lien is the superior equity.

This question, we think, has been finally put at rest in this state by the decisions of this court in *Edminster v. Higgins*, 6 Neb., 265, and *Rhea v. Reynolds*, 12 Id., 128. The opinions in both cases were written by the present chief justice, MAXWELL, and in the former case it is said: "This provision of the common law" (referring to vendor's liens) "doubtless had great influence in leading the court of chancery of England to adopt the doctrines of vendor's lien from the civil law, to prevent a failure of justice. But this doctrine can have no application in this state, where debts are a charge upon the lands of decedents, and where the estate descends or is devised subject to such debts. We are clearly of the opinion that the doctrine of a vendor's lien in a case like the one at bar is repugnant to our statutes in relation to real estate, and is therefore no part of our law."

That was a case in which the alleged lien of the vendor

was sought to be enforced against the heirs of the vendee, and not where the interests of a third party, without notice, were involved. The latter case was one in which an action was commenced by the vendor of real estate upon a promissory note for the purchase price of the real estate, and for the purpose of enforcing a vendor's lien. The district court found that no lien existed, and dismissed the action. It was held that Rhea, the plaintiff, was entitled upon the pleadings to judgment against Reynolds for the amount of the note, and the case was reversed for that reason, in which opinion it is said: "We adhere to our decision in *Edminster v. Higgins*, 6 Neb., 265, in that a vendor of real estate, upon an actual conveyance thereof by deed, has no lien upon the land so conveyed for such portion of the purchase money as remains unpaid. The reason is, the grantor has parted absolutely with all claims and demands upon the land and cannot be allowed to enforce special demands against it not arising by contract or operation of law."

As the bill of exceptions does not contain the evidence introduced by VanGundy upon the trial, we cannot say as to what his rights are, or when his lien attached. The decree, so far as his interests are concerned, will not be molested.

The decree of the district court will therefore be modified in this court, and the decree will be that the lien in favor of Templeton Brothers is superior to that created by the mortgage of plaintiff, and that the same be foreclosed; the proceeds arising from the sale of the real estate upon the foreclosure of the mortgage to be applied—first, to the payment of the lien of Templeton Brothers; second, to the amount found due upon the mortgage; and third, to the amount due VanGundy on his lien.

JUDGMENT ACCORDINGLY.

THE other judges concur.

STATE OF NEBRASKA, PLAINTIFF IN ERROR, V. MORRIS
KELLNER, DEFENDANT IN ERROR.

1. **Criminal Law: MISDEMEANOR: TRIAL.** Defendant was arrested upon a complaint, tried before a justice of the peace for a misdemeanor, convicted, and appealed to the district court. Upon trial in that court, testimony was introduced tending to establish all the material allegations of the complaint. Upon the close of the state's testimony, defendant moved the court that the cause be dismissed and the defendant discharged, which motion was sustained. *Held Error.*
2. ———: **FALSE WEIGHTS: EVIDENCE.** Where a defendant was charged with keeping and having charge of scales for the purpose of weighing live stock, grain, coal, and other articles, and knowingly and willfully reporting false or untrue weights, whereby another was defrauded, it was *Held*, Competent for the purpose of showing guilty knowledge to prove that at or about the time alleged in the complaint the defendant used and caused to be used, in the weighing of stock and grain, a loaded weight, heavier than other and correct weights kept by him, thereby causing the apparent weight of the stock, hay, etc., to be diminished.

EXCEPTIONS from Madison county.

John S. Robinson, County Attorney, and William V. Allen,
for plaintiff in error.

No appearance *contra.*

REESE, J.

This is a proceeding in error instituted by the county attorney of Madison county, under sections 514, 515, and 517 of the criminal code. The prosecution was instituted against defendant in error before a justice of the peace of Madison county, for a violation of section 136 of the criminal code.

A trial was had before the justice of the peace, which

State v. Kellner.

resulted in a conviction of defendant in error. From the judgment of conviction he appealed to the district court. In that court a jury was impaneled and the trial proceeded with until the testimony of the state had all been introduced, when the defendant moved the court for an instruction to the jury "to find for the defendant." "The motion sustained by the court. State duly excepted. Whereupon the jury was duly discharged by the court and the prisoner discharged from custody. State duly excepted."

It is insisted here that the court erred in discharging the jury and discharging the defendant.

There is no question made which requires notice as to the sufficiency of the complaint. Our attention must be alone directed to the evidence adduced upon the trial.

Without extending this opinion to the length which would be required to copy the testimony of the various witnesses, and for the purposes of this decision alone, we think it may be said that the following facts were sufficiently established to require their submission to the jury. These are: That defendant was engaged in the business of purchasing stock and grain in the village of Madison, Madison county, using as his own a platform scales upon which to weigh the stock and grain purchased by him; that upon the occasion referred to in the testimony the witness Trine sold defendant five loads of hogs and delivered the same, they being weighed on the scales in question; that at the time that the last load of hogs was weighed he went to defendant, who was standing at the scales, picked up one of the weights, suggested that his load weighed lighter than he had expected, asked that the 2,000 pound weight which had been used should be removed, and another one placed upon the beam of the scales, which was done, and a different weight produced, but it seems not to have been definitely settled as to just what the difference was. Defendant remarked that it made about five pounds difference, which he allowed to the witness.

The weight referred to by the witness was similar to the other weights, with the exception that what appeared to be a "round drilled hole" was in the weight, which had been filled up with some white metal, resembling lead. It was shown that this weight was used by defendant in weighing stock and grain. On two or three occasions the three 2,000-pound weights were obtained from his scales, without his knowledge, and carefully weighed. Two of the weights weighed exactly four pounds each, the other, being the one containing the metal referred to, which is described as having the appearance of lead, weighed four pounds, one ounce and a half. Some testimony was introduced tending to prove the difference which would be produced in weighing by the use of the heavy weight, the other weights being shown to be correct. I quote from the testimony of one of the witnesses:

"Q. Will you state what the difference in pounds would be of a weight that was used upon the end of a beam that so used would weigh 2,000 upon the platform, and a four pound weight when there is an ounce and a half added to it? What would be the difference in pounds?

"A. As near as I can judge it is between forty-seven and fifty pounds. There is a difference. Some scales break on two pounds, and on a large platform scales like this, two pounds is as close as you can ordinarily figure. I think it will make from forty-seven to fifty pounds, ordinary quick weighing, as we ordinarily do business, and as Mr. Kellner does, and as a man ordinarily weighs."

The section of the statute above referred to makes it criminal for any person knowingly to keep or to have in charge any scales or steelyards for the purpose of weighing live stock, hay, grain, coal, or any other articles, who shall knowingly and willfully report any false or untrue weights, whereby another person or persons may be defrauded or injured. While there is no direct or positive proof that witness Trine was defrauded or injured in the sale of the

hogs referred to to defendant, yet we think there was clearly sufficient testimony upon all the essential parts of the case to require its submission to a jury.

If the two weights which were alleged to have been the correct ones were not used at all times, and the inaccurate weight was used, that weight being the heavier, it would follow that the seller of stock to defendant would be a loser, defrauded, if the loss was occasioned with the knowledge of the defendant. These facts were alone for the jury to determine upon evidence.

Probably for the purpose of proving guilty knowledge on the part of defendant, the witness Wilburger was called, sworn, and, after testifying that he had worked for defendant, said: "I unloaded grain and hogs and weighed and helped weigh part of the time."

Q. It was part of your business then to use the scales you have mentioned, that was owned by Mr. Kellner?

A. Yes, sir.

Q. Do you remember how many two thousand pound weights there were on these scales?

A. I seen three on the scales.

Q. You may describe those three weights?

A. They all looked alike to me, one of them had some lead in it or was filled with something that looked like lead.

Q. You may state to the jury where these weights were kept while you worked for Mr. Kellner?

A. Well, a part of the time they were on the scales; sometimes two and sometimes three. I found one of them up on a cross beam in the elevator one day.

Q. Which one did you find on the cross beam of the elevator?

A. One of the two thousand pound weights.

Q. Can you describe that one that you found there?

A. That was the one that had the lead in it; that is the only way I can describe it.

Q. You say that you weighed hogs and grain for Mr. Kellner?

A. Yes, sir.

Q. You may go on and state to the jury if he ever interfered with you while you were weighing hogs and grain?

Defendant objects as being incompetent, irrelevant, and immaterial. Objection sustained by the court. State then and there duly excepted.

Q. Do you know whether Mr. Kellner ever used this weight that had the lead in it?

Defendant objects as being incompetent, immaterial, and irrelevant. Objection sustained by the court. State duly excepts.

Q. Now, Mr. Wilburger, do you know whether all three of these 2,000-pound weights were used by Mr. Kellner in weighing upon these scales while you worked for him?

Defendant objects as being incompetent, irrelevant, and immaterial. Objection sustained by the court. State duly excepts.

By Mr. Robinson: "The prosecution now offers to show by the witness upon the stand——"

Defendant objects that no offer can be made in criminal cases to prove certain facts. Objection sustained by the court. State then and there duly excepted.

Q. I want you to tell the jury, Mr. Wilburger, if you can, whether it is true or not, while you were weighing a load of Kellner's hogs—a load of hogs on Mr. Kellner's scales, on one occasion, Mr. Kellner interfered or changed the weights?

Defendant objects as being incompetent, irrelevant, and leading. Objection sustained by the court. The state duly excepted.

As to the weight of the testimony actually given tending to prove the allegations of the complaint the jury were the

Prehm v. State.

sole judges. If no testimony were introduced to prove such facts, it would have been the duty of the court, upon request, to instruct the jury to find the defendant not guilty, but, as we have heretofore said, there was evidence tending to prove each material allegation of the complaint and this should have been submitted to the jury.

While it is probably true that in the examination of the witness Wilburger the time fixed was not identical with that charged in the indictment, yet it would have been competent for the purpose of proving guilty knowledge on his part, and should have been admitted.

The court therefore erred in rejecting the offered testimony and in discharging the defendant.

JUDGMENT ACCORDINGLY.

THE other judges concur.

29 673
51 634

AL. A. PREHM, PLAINTIFF IN ERROR, V. THE STATE OF
OF NEBRASKA, DEFENDANT IN ERROR.

Criminal Law: FALSE PRETENSES: EVIDENCE. An information was filed against plaintiff in error for obtaining personal property of another by false pretences, which pretences were alleged to be the representation that "five certain worthless drafts were each worth the sum of \$100," etc. Upon the trial the instrument was introduced in evidence and admitted, over the objection of plaintiff in error. This instrument was not a draft, its character being shown by the copy set out in the opinion. It was held to have been improperly admitted, and that there was a variance between the allegation of the information and the proof.

ERROR to the district court for Red Willow county.
Tried below before GASLIN, J.

Agee & Wiley and *Colfer & Cordeal*, for plaintiff in error, cited: *Lancaster v. State*, 9 Tex. App., 393. *People v. Gates*, 13 Wendell, 311. *Hite v. State*, 9 Yerg., 357. *Grummond v. State*, 10 Ohio, 510. *U. S. v. Keen*, 1 McLean, 429. Wharton Cr. Pl. and Pr. (8 Ed.), 184.

William Leese, Attorney General, for the state, cited: Sec. 412, Crim. Code. *Guthrie v. State*, 16 Neb., 671. *State v. Barker*, 64 Mo., 282. *State v. Myers*, 82 Id., 558.

REESE, J.

An information was filed in the district court of Red Willow county charging plaintiff in error with the crime of obtaining personal property of the value of \$250, of one Jas. Wilson, by false pretences. Upon this information a trial was had, resulting in a verdict of guilty, and sentence thereon to the penitentiary. From this judgment and sentence he prosecutes error to this court. A number of questions are presented for decision, but in our view a decision of one must dispose of the case, and as the others will not probably arise upon a future prosecution, they will not be discussed.

The charging part of the information, in so far as it relates to the question to be examined, is, that plaintiff in error "did unlawfully and feloniously pretend to one James Wilson that five certain worthless drafts were each worth the sum of \$100, by which false pretences the said Al. A. Prehm, then and there unlawfully did obtain in exchange for said five worthless drafts, from the said Wilson, one bay gelding, of the value of \$100, and did obtain one black mare, of the value of \$150, the aggregate value being of the sum of \$250, being the personal property of said James Wilson, with intent, then and there, and thereby, and by means of the false pretences, aforesaid,

to cheat and defraud the said James Wilson. Whereas in truth and in fact the said five certain drafts so exchanged as aforesaid, were wholly worthless," etc.

Upon the trial the drafts referred to were offered in evidence and received over the objection of plaintiff in error. These alleged drafts were duplicates in appearance, with the exception of the number, printed in red ink in the lower left-hand corner. One of the alleged drafts, being number 1705, is attached to the bill of exceptions.

It is printed on green tinted paper, in the center of of which is rather indistinctly printed, in red ink, in diamond form, an impression corresponding in general appearance to the internal revenue stamp, formerly printed upon drafts, checks, etc., and on which is printed, in the same indistinct manner, the words "Trade Mark." Around the outer edge of the instrument is printed a border, somewhat resembling the border surrounding United States notes.

In the upper left-hand corner is printed the figures "\$100." Under this is a *vignette* figure, of the kind usually seen upon bills of exchange and other instruments of like character, and across which is written the word "Registered." In the upper right-hand corner is also a *vignette* figure representing, perhaps, the face of the author or maker of the instrument. Printed in the border at the top, appear the words "Issue of March 8th, 1877." The following is a copy of the instrument:

"Office of E. Durand, Estey Organ Depot, St. Joseph,
Missouri.

"This draft will be received by me at the Estey Organ Depot in Saint Joseph, Missouri, for

One Hundred Dollars,

in payment for any style of Estey organs the holder of this may select at catalogue prices. The balance of the organ to be paid in cash or approved paper bearing ten per cent interest.

"E. DURAND."

On the back of this instrument is printed the following: "When the holder of this draft wishes to use the same to purchase an Estey organ, a catalogue of all the latest styles will be forwarded by addressing the Estey Organ Depot, in St. Joseph, Missouri, and a selection can be made from the catalogue equally as well as if they were at the warerooms in person, and the exchange can be made by the aid of the express companies."

This instrument, although not a draft, is neatly printed and well calculated to deceive the unsuspecting, and offers an opportunity for the strong to prey upon the weak, unscrupulous and cunning dishonesty to take advantage of ignorance and credulity. Notwithstanding these facts, the question presented is a simple question of law, and that is, whether or not the instrument is in fact a draft, and whether there is a variance between the allegations of the information and the proof.

"A draft" as defined by Bouvier, "is an order for the payment of money, drawn by one person on another."

It is well settled that the descriptive averments in an indictment must be proved as alleged in order to warrant a conviction. In support of this, no authorities need be cited.

In *Lancaster v. State*, 9 Texas Court of App., 393, the defendant was indicted, tried, and convicted upon an indictment charging that on a certain day he committed the crime of larceny, by stealing from the owner thereof \$142, current money of the United States. Upon the trial, it was proved that the property obtained consisted of checks, of various denominations, instead of money. It was held that there was a variance in the proof, and the indictment was not sustained.

In *Grummond v. State*, 10 Ohio, 510, the defendant was indicted for stealing bank bills; the proof showed that the property stolen consisted of orders of the Ohio Railroad Company, and the variance was held to be fatal.

 Robare v. Kendall.

In *State v. Handy*, 20 Maine, 81, the defendant was indicted for forgery. The instrument forged was alleged to be an acquittance or discharge for the sum of \$48. It was, on its face, an order for the sum of \$48, and on its back was an order for the further sum of \$1. It was held that there was a variance between the allegations and proof.

The instrument introduced in evidence, in this case, does not contain a single quality of a draft, excepting the words, "This draft will be received," etc.

The fact that upon its face it is called a draft does not make it one. There is no general description of the instrument in the information by which the purport or tenor of the instrument might be known. The pleader must be held as intending to allege that the instrument made use of for the purpose of accomplishing the fraud was what is ordinarily known in commerce as a draft.

The judgment of the district court is reversed and the cause remanded for further proceedings.

THE other judges concur.

REVERSED AND REMANDED.

22	677
25	468
22	677
47	501

WILLIAM ROBARE, PLAINTIFF IN ERROR, v. A. M. KENDALL, DEFENDANT IN ERROR.

Appeal from Justice of Peace: UNDERTAKING. In an action pending before a justice of the peace, judgment was rendered in favor of plaintiff and against defendant. Defendant appealed to district court. At a succeeding term of the district court plaintiff moved the court for an order requiring a further undertaking on appeal. The motion was sustained and defendant ordered to give a further undertaking within twenty-five days, and that if not filed in said time the appeal to be dismissed.

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The undertaking was not filed within the time prescribed by the order, but at the succeeding term of court defendant appeared and filed a showing in effect that the security upon the undertaking for appeal was sufficient, and asked further time in which to file additional undertaking, if one were required. Time was granted by the district court. *Held*, No error, the first order requiring the additional security not being complied with and the court not having lost its jurisdiction of the case.

ERROR to the district court for Valley county. Tried below before TIFFANY, J.

M. Randall (*E. W. Metcalfe* with him), for plaintiff in error, cited: *Maxwell's Pl. and Pr.*, 745. *Iler v. Darnell*, 5 Neb. 192. *Taylor v. Fitch*, 12 Ohio State, 172. *Smith v. Pinney*, 2 Neb., 145. *Hansen v. Bergquist*, 9 Id., 269.

A. M. Robbins, for defendant in error, cited: *Miller v. B. & M. R. R.*, 7 Neb., 227. *Previtt v. People*, 5 Neb., 382.

REESE, J.

This action was originally commenced before a justice of the peace of Valley county, judgment in that action being rendered in favor of plaintiff therein. Defendant appealed to the district court. At the May term, 1886, of that court the plaintiff filed a motion in which he moved the court to require defendant to give additional security on the undertaking for appeal. This motion was sustained, and the following order was made and entered upon the journal: "Now, on this 21st day of May, 1886, at the coming in of the court, the defendant, by his attorney, A. M. Robbins, filed an affidavit to show cause why he should not be required to give additional undertaking on appeal. After due consideration the court ordered that the defendant give a further undertaking on appeal within

Robare v. Kendall.

twenty-five days, and that the defendant should file said good and sufficient undertaking, to be approved by the clerk of this court, and that if not filed in said time this appeal to be dismissed at the cost of the appellant, amounting to \$18.93.

It appears from the record that the additional security was not given within the twenty-five days, nor at any time until the subsequent term of the district court held in December, 1886, when, upon motion of defendant, further time was given in which to file additional appeal bond, the order as entered upon the journal being as follows:

"Now on this 20th day of December, 1886, this cause came on for hearing, on motion by the defendant to be allowed to proceed to trial, and on consideration of which the same is sustained and the said defendant ordered to give additional security on the appeal bond within five days, the same to be approved by the clerk of this court."

Plaintiff complains of this last order, and brings the case into this court by proceedings in error. The allegations of his petition are, *First*, That the court erred in not denying the motion of defendant and granting further time in which to file amended undertaking on appeal; *Second*, The court erred in sustaining the motion; and *Third*, The court erred in giving defendant five days in which to file said undertaking. The contention on his part is, that the order of May 21st not being complied with, the cause was dismissed and the court had no jurisdiction or authority to make the subsequent order.

The defendant in error filed his motion in this court to quash the proceedings in error and strike the case from the docket, for the reason that a final judgment had not been rendered in the district court as appears from the record.

The real question presented by the petition in error is, whether the order of the 21st day of May was a final order, and had the effect of dismissing the case, its terms not being complied with. The question presented by the

motion is identical with that as by the petition in error. The motion will therefore not be considered, and the case will be disposed of upon its merits.

If the order of May 21st was final, and the failure of defendant to comply with its terms by the day fixed had the effect of dismissing the case, it is apparent that at the subsequent term of court no jurisdiction could be had in the premises, and the order complained of by the plaintiff in error in this court would be void. But we do not think that order was final. The motion then pending before the court was to require additional security on the appeal bond. This motion was sustained and the security required. The time within which the security could be given or the amended undertaking filed was fixed at twenty-five days, the language of the order being: "That if not filed in said time this appeal to be dismissed," etc. Had the twenty-five days expired during the session of the court, it would have been proper for the court, upon its attention being called to the fact that the amended undertaking had not been filed, to enter a final order of dismissal, and the case would then have been dismissed. Court was not in session at the expiration of the time, and no action was taken, so far as the record before us discloses, until the next term of court, in December following.

Section 1016 of the civil code provides that, "In proceedings on appeal, when the surety in the undertaking shall be insufficient, or said undertaking is insufficient in form, it shall be legal for the court, on motion, to order a change or renewal of such undertaking, and direct the same to be certified to the justice of the peace from whose judgment the appeal was taken, or that it be recorded in said court."

Under the provisions of this section it was entirely competent for the district court to order a renewal of the undertaking and that the same should be filed in that court. It was competent for the court, in making the order, to attach

Hoagland v. Van Etten.

thereto the additional order dismissing the action in case the bond was not filed, and had the court seen proper in the exercise of its discretion to have adhered to the order of dismissal and refuse to allow the filing of an amended undertaking at the next term, it would no doubt have been proper so to do, in case its discretion was not abused.

In the order of May 21st the right of defendant to file an amended undertaking might have been cut off and the cause dismissed at the December term, but the district court, doubtless in furtherance of justice, saw proper to permit the additional bond to be filed. In this we can see no error. There is no statutory provision covering cases of this kind, neither have there been any adjudications in this state upon this question, but so far as we are advised the practice throughout the state has been in accordance with the proceedings of the court below.

No error appearing, the order of the district court is affirmed.

ORDER AFFIRMED.

THE other judges concur.

GEORGE A. HOAGLAND, APPELLEE, V. EMMA L. VAN
ETTEN, APPELLANT, AND ANDREW MOYER AND
ABNER FRENCH.

1. **Parties:** The real party in interest under section 29 of the code is the person entitled to the avails of the suit.
2. **—: ASSIGNEE.** A mere assignee having no interest in the result of the suit, but who obtains an assignment upon a promise to pay the assignor the amount he may derive from the action, is not the real party in interest under section 29, and cannot maintain the action.

29	681
38	191
22	681
31	297
22	681
43	700
23	681
47	667
29	681
50	462
51	523
54	188
55	442

3. **Mechanic's Lien: DEFENSE.** While the owner of a building is liable to material men and laborers under our mechanic's lien law, for material furnished or labor performed for a contractor on such building, yet, as a different rule prevails for asserting such lien, the owner may plead as a defense the fact that the labor or material was furnished to a contractor and that no lien has been obtained.

APPEAL from the district court of Douglas county.
Heard below before WAKELEY, J.

David Van Etten, for appellant, cited: Sec. 29, code. *Baldwin v. Wheeler*, 50 Iowa, 46. Dicey on Parties, 14, 522, 527, 532.

Warren Switzler, for appellee George A. Hoagland, cited: Pomeroy Remedial Rights, Sec. 132, and cases cited.

MAXWELL, CH. J.

This is an action to foreclose a mechanic's lien upon certain real estate described in the petition, owned by Mrs. Van Etten; Moyer claims for material furnished to one Hayden, a contractor in the erection of the defendant Van Etten's dwelling, and French is a senior mortgagee. The amount claimed to be due the plaintiff for material furnished by him is the sum of \$803.76, with interest. He also claims there is due him the sum of \$17.07 upon the account of one Andrew L. Wiggins, and the sum of \$18.87 on the account of Harvey S. Nutting. He further claims to be due him the sum of \$86 on the account of Ruton Gsanter & Co., and on the account of Nich. Spellman the sum of \$72, and \$24 on the account of one Wm. Klatt; \$13.87 on the account of Hans Tams; \$28.82 on the account of Jacob New; \$30.05 on the account of Sullivan Bros.; \$163.12 on the account of Sidney D. Crawford; \$40.87 on the account of John Liibbe; \$48 on the account of

Abner C. Smiley; \$21.41 on the account of N. J. Sander; \$58.83 on the account of James Morton & Son; \$213 on the account of Henry A. Koters. The plaintiff also alleges "that he owns the above claims against said last named defendant, and they are all past due, and demand has been made on the said defendant for payment, and payment thereof was refused and no part of any of said claims has been paid."

The defendant in her answer denies that the plaintiff owns the claims above set forth, and alleges that the plaintiff is not the real party in interest. On the trial the court instructed the jury: "It will not be necessary for you to determine whether the assignment was valid or not; but you will allow the amount due, if anything, on each particular claim the same as if sued on by the original party, and subject to the same defenses, if any, regardless of the alleged assignment."

It is conceded that the assignments were merely formal to enable the plaintiff to bring the action for all, and that he is not the real party in interest. In justification of this course, the plaintiff's attorney cites Pomeroy on Remedial Rights and Remedies, section 132. In all the cases cited by Mr. Pomeroy in support of his proposition, except two, the plaintiff had an interest in the proceeds resulting from the suit. It was not a case of an entire want of interest, but merely a defect of parties plaintiff. In such case it is well known that if one of the proper parties brings an action and no objection is made for defect of parties, he may maintain the action although others should be brought in, as where a debt is assigned as collateral security for a less sum than the value of the debt, the assignee may maintain an action on the security although the assignor having an interest in the surplus would be a proper party.

Section 29 of the code provides that, "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 32."

In *Mills v. Murray*, 1 Neb., 327, it was held that the assignee or actual owner of a chose in action is the proper and only party who can maintain a suit thereon. This doctrine was affirmed in *Seymour v. Street*, 5 Neb., 93, *Hickland v. Nebraska City National Bank*, 8 Neb., 463. The language of the statute is plain and unambiguous, "Every action *must* be prosecuted in the name of the real party in interest, except," etc. This case is not within any of the exceptions named, and therefore must be considered with reference solely to section 29. If a party having no interest in the subject-matter of the suit, who holds simply as assignee, and is to deliver to his assignor the proceeds of the action, may maintain an action on such an assignment, then section 29 has no meaning whatever. We do not care to enter into a discussion of the propriety, or impropriety, of requiring actions to be brought in the name of the real party in interest. The statute contains a plain provision which this court has no authority to disregard. We hold, therefore, that an assignee having no interest in the result of the suit, and not entitled to any portion of the proceeds thereof, is not entitled under section 29 to maintain an action as the real party in interest. Where a number of persons hold mechanics' liens against certain real estate, such persons may and should be brought before the court, as among such lienholders there is no priority, but each lien should stand upon its own separate facts, in order that issue may be taken thereon.

The first answer filed by the defendant was to a great extent stricken out on motion. An amended answer was thereupon filed, the sixth and seventh counts of which were stricken out, and the sustaining of such motion is now assigned for error. Said counts are as follows: "Said defendant, for a further defense in said action, alleges the facts to be that on or about the 10th day of September, 1883, she contracted with one David I. Hayden, a contractor and carpenter and joiner, in said city of Omaha,

by a duly written, signed, executed, and delivered contract (a copy of which is hereto attached, marked 'Exhibit A,' and hereby made a part of this answer), and that by virtue of said contract, of which each and every one of said parties had knowledge, said Hayden agreed to and with said defendant, for certain and specified sums of money to be paid as in said contract specified, amounting in all to the sum of \$975, of which no payment was required until forty-five days after the completion and acceptance of said work specified, and then not to exceed twenty dollars per month without interest until due, with forbearance of ninety days after any payment became due before action or foreclosure of lien could be instituted, and of nine months after decree and termination of action before said property could be advertised for sale thereunder, and other conditions of payment as in said contract specified, to construct and erect for said defendant, as in said contract specified, two certain and specified additions to her house on said lot, and to furnish all the labor, skill, mechanism, and materials for said work and building, and to do and perform other work on said lot and furnish the materials for the same as in said contract specified, and that whatever materials, services, and labor said plaintiff and either, any, or all of said named parties furnished and supplied for said work and building and appurtenances, if any, were furnished and supplied to the said Hayden, under and by virtue of the said contract of which they each and all had knowledge before furnishing or doing anything whatsoever upon the same, and they each and all so intended and furnished nothing whatsoever to said defendant, and did nothing whatsoever for her or at her instance and request, as they each and all well knew and so intended.

"That in pursuance of said contract by and between said Hayden and said defendant, said Hayden commenced said work and employed one Nich. Spellman to do and perform the brick work specified in said contract, and he,

Spellman, to furnish all the labor and materials for the same as said Hayden's contractor, being the sub-contractor of said work; that said Spellman as said sub-contractor agreed to and with said Hayden to do and construct said brick work, furnishing all the materials and labor for the same as in said original contract specified, for the sum of \$11 per thousand laid in the wall finished and completed, to apply on an indebtedness of the said Spellman to the said Hayden, and commenced to do the same, but failed entirely to complete said work, doing but a very small part of the same, and what he did do he did in violation of said contract, and in such a shabby, worthless manner, and used such poor and worthless material that portions of his said work fell down, and said defendant was obliged to rebuild the same, after failure and notice to said Spellman and the said Hayden, and that said Spellman's work as aforesaid was of no value whatever, but on the contrary was a damage to said building and cannot be repaired without removing the same and rebuilding, damaging said defendant more than \$500, and said Hayden and said Spellman have neither of them repaired said damage or any part of it, notwithstanding they each had full knowledge and information and were notified by defendant of the same, and that said work and materials furnished were in violation of said contract."

There are doubtless allegations in these counts which are immaterial, and probably had a proper motion been filed could have been stricken out, but a party is entitled to set up all the defenses he may have to an action. If where a defense is set up that material was furnished to a contractor for the erection of a building for the defendant, while the contract between the contractor and the person erecting the building will not prevent a recovery in a proper case for material furnished or labor performed upon the structure, yet the time in which the lien is to be filed is limited to sixty days, while if the contract is made with the

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owner the person claiming the lien has four months in which to file the same. The allegation in the petition as to the date of filing the several liens assigned to the plaintiff is in blank. A party is entitled to have a case submitted to a jury upon his theory, provided that the answer, if taken as true, would constitute a defense to the action and there is testimony tending to support the answer. As there must be a new trial in this case and many of the facts are practically conceded, as that the defendant, Mrs. Van Etten, is the owner of the lot in controversy, it would seem to be unnecessary to introduce a number of the voluminous records used on the hearing of the case; but this is a matter within the control of the trial court.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

HENRY BERRER, PLAINTIFF IN ERROR, v. PHILIP C. MOORHEAD, SHERIFF OF NUCKOLLS COUNTY, NEBRASKA, SPRINGER GALLEY, THOMAS FICKES, ED. KENNEDY, AND W. B. CRAWFORD, SURETIES OF SAID PHILIP MOORHEAD, DEFENDANTS IN ERROR.

1. **Unlawful Imprisonment: ACTION AGAINST SHERIFF: PLEADING.** In an action against a sheriff for damages for unlawful imprisonment, under indictment for a misdemeanor, when the petition alleges that a recognizance with ample surety was tendered to the sheriff and a discharge of plaintiff demanded thereunder, but such discharge was refused, but it was shown by the petition that no affidavit of qualification of the sureties was attached to or accompanied the undertaking, the petition would not for that reason alone be demurrable.

22	687
34	414
34	772
22	687
62	618

2. **Pleadings: AMENDMENT.** Under the law of amendments contained in the civil code, where a petition is held defective and a demurrer thereto sustained, if it appears that the petition is susceptible of amendment, the district court should permit such an amendment to be made, upon such terms as to costs as would be just.
3. ———: ———. The law of amendments should be liberally construed in order to prevent a failure of justice.

ERROR to the district court for Nuckolls county. Tried below before MORRIS, J.

H. W. Short, for plaintiff in error.

W. A. Bergstresser, for defendant in error.

REESE, J.

This action was commenced in the district court of Nuckolls county, against the sheriff of said county, for the recovery of damages alleged to have been sustained by plaintiff by reason of the wrongful imprisonment of himself by defendant. A general demurrer was filed to the petition, which was sustained, the application of plaintiff for permission to amend his petition denied, and the cause dismissed. Plaintiff alleges error in this court.

We here quote the petition in full:

"Henry Berrer, plaintiff in the above entitled cause, deposes and says: 1st. That on the 29th day of April, 1885, he was arrested under a state warrant issued out of the district court of Nuckolls county, Nebraska, upon an indictment found by the grand jury in said Nuckolls county, Nebraska, at the April term, 1885, against this plaintiff for a misdemeanor, to-wit, resisting an officer, to-wit, the sheriff of said Nuckolls county, Nebraska, and his deputies on the 25th day of March, A.D. 1885, in performing their duties. That the said Philip C. Moorhead, as sheriff aforesaid, on the 29th day of April, 1885, took this plaintiff

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iff, and lodged him in the common jail of said county. That the offense for which this plaintiff was arrested and imprisoned was and is bailable under the statute and the law of the state. And immediately thereafter the said district court adjourned, having fixed the amount of bail at the sum of three hundred dollars. That afterwards, to-wit, May first, A.D. 1885, at three o'clock P.M., this plaintiff, by his attorney, H. W. Short, procured and delivered to said Philip C. Moorhead a good and sufficient bond for the appearance of this plaintiff on the 5th day of October, A.D. 1885, at ten o'clock A.M., that being the first day of the next regular term of said court, as fixed by Hon. W. H. Morris, judge, on the 1st day of January, A.D. 1885, and as will appear from the journal entry of said district court, and to do and to receive what shall be adjudged by said court upon him, and shall not depart the said court without leave, which said bond was signed by Henry W. Short, James M. Hall, S. A. Lopp, and J. Ritterbosh, residents and freeholders of the county of Nuckolls and state of Nebraska, whose aggregate wealth is at least thirty thousand dollars over and above all debts and liabilities. That said sheriff of Nuckolls county, Nebraska, Philip C. Moorhead, at the time of the delivery of said bond and upon demand for the release from confinement of the said Henry Berrer, now in jail, so made by his attorney, H. W. Short, then and there refused to release said prisoner from said jail of Nuckolls county, Nebraska, and still continued and refused to release said plaintiff for the space of days. That said Philip C. Moorhead, as sheriff, made and executed and delivered to Nuckolls county, Nebraska, his bond of office, a copy is hereunto attached, marked exhibit 'A,' and made a part of this petition. That said sheriff is guilty of oppression in the discharge of his duty as sheriff, in this, that he has refused to accept of the appearance bond tendered by plaintiff for his appearance at the next term of court. That the plaintiff has [been] detained from his

home and family and his labors, and has been held a prisoner in the common jail of said Nuckolls Co., Nebraska, by said sheriff, contrary to law, to his damage \$1,000; a copy of the bond tendered and delivered to said sheriff for the appearance of said plaintiff is hereto attached, marked 'B,' and made a part of this petition. The plaintiff therefore prays judgment against said Philip C. Moorhead, sheriff, and against his bondsmen, Springer Galley, Thomas Fickes, Ed. Kennedy, and W. B. Crawford, sureties on said bond, for the sum of one thousand dollars so as aforesaid sustained, and for costs of suit."

The errors assigned in this court are as follows:

"1st. The court erred in sustaining the demurrer of defendant to the petition of the plaintiff.

"2d. The court erred in refusing the plaintiff permission to amend his petition before the judgment of dismissal.

"3d. The court erred in rendering judgment of dismissal against the plaintiff.

"4th. The court erred in refusing the plaintiff's motion to set aside the judgment of dismissal, and refusing to allow plaintiff to file an amended petition or to be further heard."

By the record of the district court before us the following appears: "Now on this 5th day of October, 1885, it being the first day of said term, this case came on to be heard on the demurrer of defendants to the petition of the plaintiff, and the demurrer is sustained, to which ruling of the court plaintiff excepts. The plaintiff asks leave to amend, but leave is denied by the court, to which ruling of the court the plaintiff excepts. It is therefore considered, ordered, and adjudged by the court that said case be dismissed. Plaintiff files a motion to set aside the judgment, to reinstate the cause, and permission to file amended petition. Motion denied by the court, to which ruling of the court plaintiff excepts."

The first question requiring our attention is, does the

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petition state a cause of action? The one contention on the part of defendant in error upon this question is, that it is fatally defective because it failed to show the affidavit of the sureties offering such bond setting forth their qualification. To sustain this contention, section 897 of the civil code is cited. In our opinion this section can have no application to the case at bar. It only alludes to the duties of ministerial officers when taking security on an undertaking provided for by that code, and has no reference to the duties of a sheriff in the case of taking and approving recognizances, during vacation, of persons who have been indicted during the session of the court. For the duties of sheriffs in cases of this kind, we must refer to section 428 of the criminal code, which is as follows: "When any sheriff or other officer shall be charged with the execution of a warrant issued on any indictment for a misdemeanor, he shall, during the vacation of the court from which the writ issued, have authority to take the recognizance of the person so indicted, together with sufficient sureties, resident and freeholders in the county from which such writ issued, in a sum of not less than \$50 nor more than \$500, conditioned for the appearance of such person on the first day of the next term of such court."

It appears by the petition that the offense for the commission of which plaintiff had been indicted was a misdemeanor and bailable under the section above quoted. It was the duty of the sheriff, therefore, to accept a proper recognizance and discharge plaintiff. If in his opinion the sureties offered were insufficient, he had a perfect right to require additional security, or perhaps, if unacquainted with those offered, to require them to justify or make an affidavit of qualification. But it would clearly be his duty, in case he found the sureties offered insufficient, or in case their qualifications were unknown to him, to make known to the person offering the bail the reason why he rejected

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it, in order that the defect, if any, might be cured. The mere fact, then, that the undertaking did not contain the affidavit of the sureties offered on the bond, setting forth their qualifications as such, would not necessarily deprive the plaintiff of his right to prosecute his action.

If the demurrer was sustained upon this ground alone, the decision of the district court was erroneous; if for any other reason the petition was defective, which defect might have been cured by an amendment, it was the duty of the district court to permit such amendment to be made. For this reason the judgment of the district court is reversed and the case remanded for further proceedings according to law.

REVERSED AND REMANDED.

THE other judges concur.

32	692
34	673
28	692
43	257
22	692
48	708
22	692
49	455
54	153

NANCY A. MCKESSON, PLAINTIFF AND APPELLANT, V.
ELLEN HAWLEY, DEFENDANT AND APPELLEE.

Trust Deed: REDEMPTION: STATUTE OF LIMITATIONS. On the 12th of February, 1872, A executed to B a trust deed to secure the payment of a sum of money due April 12th, 1872. The trust deed provided, among other things, that if the notes were not paid at maturity the trustee should advertise and sell the real estate and convey a fee simple title to the purchaser. The notes were not paid at maturity. On the 7th day of June, 1872, the trustee advertised and sold the real estate to the highest bidder according to the terms of the trust deed. On the 12th day of September, 1873, the purchaser at the trustee's sale conveyed the property to another by warranty deed. On the 5th day of October, 1874, the property was again sold and conveyed by warranty deed, and on the 29th day of April, 1876, defendant purchased the same and received a similar conveyance. Defendant and her grantors were in open, notorious, and adverse

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possession of the property for more than ten years prior to the commencement of this action, which was to redeem the property from the trust deed. It was held that the statute of limitation had run and that plaintiff's cause of action was barred.

APPEAL from the district court of Lancaster county.
Tried below before HAYWARD, J.

N. C. Abbott, for appellant, cited: *Williams v. Cash*, 27 Ga., 507. *Bannon v. Brandon*, 34 Penn. State, 263. *Wilson v. Richards*, 1 Neb., 342. *Hearst v. Pugil*, 44 Cal., 230. *Green v. Turner*, 38 Iowa, 112. *Frink v. LeRoy*, 49 Cal., 314. Jones Mortgages, Secs. 1152, 1153, and 1159.

Lamb, Ricketts & Wilson, for appellee, cited: *Crawford v. Taylor*, 42 Iowa, 260. *Clark v. Potter*, 32 Ohio State, 49. *Knowlton v. Walker*, 13 Wis., 264. *Waldo v. Rice*, 14 Id., 286.

REESE, J.

This action was commenced in the district court of Lancaster county, the summons being issued on the 11th day of April, 1885. The suit was ejectment, seeking the possession of the real estate described in the petition.

On the 18th of October, 1886, an amended petition was filed, changing the nature of the action to one to redeem the same land, to-wit, the west half of lot two, block fifty-five, in the city of Lincoln, from a lien created by a trust deed given to secure the payment of the sum of \$318.

It is alleged that the plaintiff's equity of redemption has never been foreclosed or any proceeding had or instituted for the purpose of foreclosing the said mortgage. That under the stipulations contained in said trust deed the trustee pretended to advertise and sell the property for the satisfaction of said debt, and pretended to sell the same on or about the 7th day of June, 1872, and delivered a deed

to the purchaser, Hartley, for the consideration of the sum of \$190, that being the amount for which the property was sold. And that through *mesne* conveyances from the purchaser to the defendant the title of the said Hartley had been conveyed to her. It is alleged that the proceedings to foreclose the mortgage or trust deed by the alleged advertisement and sale were void, and that the plaintiff was entitled to redeem the real estate. An accounting is prayed for of the amount due the defendant on the mortgage, and also taxes paid by her, and of the rents and profits for the use and occupation of the premises during the time the same was in the possession of the defendant and her grantors, and that after deducting therefrom the amount found due on the mortgage, the plaintiff have judgment for the remainder, and that she be immediately permitted to redeem the property.

By the answer the title of plaintiff is denied, as well as her right to the possession of the property. It is alleged that on the 12th day of September, 1873, one J. W. Hartley and his wife, claiming to own said property in fee simple, conveyed the same by warranty deed to one J. D. Smith, and that Smith thereupon entered into actual and undisputed possession of the property, claiming title under his deed from Hartley. That he remained in possession until the 5th day of October, 1874, when by warranty deed he and his wife conveyed the property to one Wealthy Craig, and that she immediately took actual possession of the property under her title thus acquired, and retained the same until the 29th day of April, 1876, when she, by warranty deed, conveyed to defendant and delivered to her the possession thereof; that thereupon defendant entered into the actual possession of the same and has ever since held open, notorious, and adverse possession thereof, claiming title thereto under and by virtue of the deeds described; that all of the deeds referred to were filed for record and duly recorded immediately after they were executed; that

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defendant and her grantors have held open, exclusive, continuous, and adverse possession of said property for more than ten years prior to the commencement of plaintiff's suit, claiming title under their deeds: thus presenting, as a defense, the statute of limitations.

The trial was had in the district court, which resulted in a decree in favor of defendant, from which plaintiff appeals.

As is shown by the record, the trust deed referred to was dated February 12th, 1882, and was given to secure the sum of \$318, due April 12th of the same year. The deed is in the usual long form, and authorizes the trustee, in case of failure to pay the moneys secured by it, to advertise the property and sell it at public auction, at a place therein directed, and upon such sale being made, the trustee to execute and deliver to the purchaser a deed in fee simple of said property.

The money secured by this trust deed, or mortgage, was not paid when it became due, whereupon the trustee proceeded to advertise and sell the property. The sale was made on the 7th day of June, 1872, J. W. Hartley being the purchaser. On the 12th day of September, 1873, Hartley sold and conveyed the property to J. D. Smith. On the 5th day of October, 1874, J. D. Smith sold and conveyed it to Wealthy Craig, and she, by a like sale and conveyance, transferred it to defendant, on the 29th day of April, 1876. The evidence shows that immediately after the purchase from Smith, and the transfer to Craig by him, on the 12th day of October, 1874, Mrs. Craig entered into actual possession of the property under her deed, and retained such possession as owner, unmolested, until the time of her conveyance to defendant, and that defendant, upon her purchase, immediately took possession and has remained in possession ever since.

There is some testimony that Smith was in possession of the property prior to his transfer to Craig, but this is not very clear. From this, it appears beyond controversy that

defendant and her grantor, Craig, were in open and adverse possession of the property from the 5th day of October, 1874, until the 11th day of April, 1885, the time of the commencement of this action, covering about ten years and a half. There is some question presented as to what the statute of limitation would be in a case of this kind, defendant claiming that plaintiff should be limited to four years, under the provisions of section 16 of the civil code. But we are inclined to think that the provisions of section 6 should be applied, which would fix the limitation at ten years. This section is as follows: "An action for the recovery of the title or possession to lands, tenements, or hereditaments can only be brought within ten years after the cause of said action shall have accrued. This section shall be construed to apply also to mortgages."

In *Crawford v. Taylor*, 42 Iowa, 260, it is said that an action to redeem from a mortgage is barred in the same time an action to foreclose would be, and cannot be maintained after ten years from the date when the right of action accrued, ten years being the statutory limitation of that state.

Applying this rule to the trust deed in question, it is apparent that plaintiff's right to redeem accrued on the 12th day of April, 1872, thirteen years before the commencement of her action. But assuming the statute of limitation would not begin to run against her at that time, it seems clear that it would begin to run in favor of defendant, under the title of herself and grantors, as soon as adverse possession was taken under the alleged purchase from the trustee. This possession dated back prior to the 5th day of October, 1874, and, as we have seen, more than ten years prior to the commencement of the action. Plaintiff's right of action is therefore barred by the statute of limitation. See *Clark v. Potter*, 32 Ohio St., 49. *Knowlton v. Walker*, 13 Wis., 264. *Waldo v. Rice*, 14 Id., 286. *Stevens v. Savings Institution*, 129 Mass., 547.

 Cortelyou v. Maben.

But it is contended by plaintiff that the possession of defendant and her grantors was not adverse; that the title of the trustee was a recognition of the plaintiff's title, and that, as the foreclosure proceedings were void, defendants could hold only as assignees of the rights of the trustee, and, therefore, not adverse. Such, to our mind, cannot be the law. Notwithstanding the fact that the foreclosure proceedings might have been void, it is clear that the purpose of such proceeding was to cut off and destroy the title of plaintiff; and therefore the conveyance by the trustee to Hartley, had it been legal, would have terminated plaintiff's title. The grantees of Hartley taking and holding the property, or asserting their right to hold it under warranty deeds from him, was clearly adverse to plaintiff. They held as owners, and the statute would run in their favor.

The decree is right, and is affirmed.

DECREE AFFIRMED.

THE other judges concur.

J. G. CORTELYOU ET AL., PLAINTIFFS IN ERROR, V.
LUTHER B. MABEN ET AL., DEFENDANTS IN ERROR.

1. **Negotiable Instruments:** DRAFT: ACCEPTANCE. The drawee of a draft wrote across the face thereof the words, "Accepted Sept. 18. L. B. Maben." *Held*, A valid acceptance.
2. ———: ———: EVIDENCE. Parol evidence that such was the purpose of the writing, not being inconsistent with the writing itself, is admissible.

ERROR to the district court for Holt county. Tried below before POST, J.

Utley & Small, for plaintiff in error, cited: *Vanstrum v.*

Liljengren, 33 N. W. R., 555. 1 *Daniels Neg. Ins.*, Sec. 497, and cases cited. *Doolittle v. Ferry*, 20 Kan., 230. *Dale v. Gear*, 38 Conn., 15.

No appearance for defendant in error.

MAXWELL, CH. J.

This action was brought in the district court of Holt county by the plaintiffs against the defendants, and on the trial the court held that the petition did not state a cause of action, and therefore refused to admit evidence under it. The jury thereupon returned a verdict for the defendants, and judgment was rendered thereon.

The following is a copy of the petition :

"Plaintiffs complain of the defendants that whereas on or about the 17th day of September, 1884, John M. Diels & Son drew their certain bill of exchange of that date, and then and there delivered the same to the Scribner State Bank, in the state of Nebraska, and then and thereby requested Maben & McCormick, at three days from sight thereof, to pay to the order of Scribner State Bank the sum of \$498.70.

"The following is a copy of said bill with all the endorsements thereon :

"\$498.70. Bank of Ewing, Collection No. 287.
SCRIBNER, NEB., Sept. 17, 1884.

At three days sight pay to the order of Scribner State Bank, four hundred ninety-eight $\frac{70}{100}$ dollars with coll. charges and exchange.

"To Maben & McCormick,
25,007. Deloit, Neb. JOHN M. DIELS & SON."

"Across the face of said bill are written the following words: 'Excepted Sept. 18. L. B. Maben.' Endorsed on the back as follows: 'Pay to the order of Cortelyou, Ege & Vanzant. John Baker, Cashier.' 'Received

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\$58.77 on the within, October 24, 1884. Cortelyou, Ege & Vanzant.'

"Plaintiff says that on the 18th day of September, 1884, said bill of exchange was duly accepted by L. B. Maben.

"On the 17th day of September, 1884, the said Scribner State Bank endorsed said bill of exchange as follows: 'Pay to the order of Cortelyou, Ege & Vanzant. John Baker, Cashier,' and delivered the same to the plaintiffs.

"On the day said bill of exchange became due and payable it was duly and legally presented to said L. B. Maben, and payment thereof demanded, which was refused, all of which the said Scribner State Bank and John M. Diels & Son had due and legal notice. The said John M. Diels & Son are liable on said bill as drawers, and the said L. B. Maben as acceptor, and the said Scribner State Bank as endorsers.

"That on the 24th day of October, 1884, there was paid on said bill of exchange and endorsed thereon the sum of \$58.77, and no more, and that there is now due and unpaid on the bill of exchange the sum of \$439.30, with interest thereon from the 24th day of October, 1884."

There is also a stipulation in the records as follows: "It is stipulated and agreed by and between the parties to said action that the only question herein to be decided by the supreme court is, whether upon the trial hereof in the district court the plaintiff should have been allowed to prove by witnesses called for that purpose, words spoken, and expressions made by the defendant contemporaneous with his act of writing across the face of the draft herein the words, 'Excepted Sept. 18, L. B. Maben,' that the defendant intended by writing said words to accept and honor said draft."

It is manifest that the court sustained the motion of defendant to exclude evidence offered by the plaintiff because of the word "excepted" written by Maben across the face of the draft.

In a number of cases it has been held that the word "excepted" thus written is an acceptance. *Vanstrum v. Liljengren*, 33 N. W. R., 555. *Miller v. Butler*, 1 Cranch C. C., 470. 1 Daniel Neg. Ins., Sec. 497. The evident purpose of Maben in writing the word "excepted" was to accept the draft, and parol proof of this purpose, not being inconsistent with the writing, was proper and should have been received. Had Maben intended to refuse acceptance it was unnecessary to put such refusal in writing, and no doubt he was well aware of this fact.

The law is not a system of quirks and quibbles upon which courts may seize to defeat rights, but a system of rules and principles, in which the rights of parties are protected and enforced, and it is the duty of a court to disregard mere prettexts and decide a case if possible upon the merits.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

THE STATE OF NEBRASKA, EX REL. ARNOLD GREGORY,
v. SCHOOL DISTRICT NO. 7, SHERMAN COUNTY,
ET AL.

School District Bonds: TAX TO PAY. Where an application is made to the court for mandamus to compel the levying of taxes for the payment of bonds issued by a school district, and it is apparent that the tax if levied in one year would be a burden upon the taxpayers of such district, the court, as a condition of granting relief, may apportion the levy over such number of years as not to be oppressive.

ORIGINAL application for mandamus.

Daves, Foss & Stephens, for relators.

No appearance for respondents.

MAXWELL, CH. J.

This is an application for a writ of mandamus to compel the officers of the school district in question to make a certain report, and the proper authorities to levy a tax on the property of such school district for the payment of principal and interest of two certain bonds, each for the sum of \$500, with interest, which bonds, it is alleged, were issued by said district and the proceeds used by it in the erection of a school-house therein. There was personal service on each of the defendants, but no defense interposed to the action. The facts stated in the petition, therefore, will be taken as true. In this class of cases, however, as a condition of granting relief where it is apparent that the tax if levied in one year would be burdensome upon the taxpayers of the district, the court will extend the levy over such a number of years as not to make the tax oppressive. As the tax in this case would be burdensome if levied upon the property of the taxpayers of the district in less than four years, such levy will therefore be extended over the period of four years. The sum now due to be divided into four installments, and a tax to pay one of said installments be levied in the years 1888, 1889, 1890, and 1891.

JUDGMENT ACCORDINGLY.

THE other judges concur.

SANFORD L. STURTEVANT, PLAINTIFF IN ERROR, V.
L. WINELAND ET AL., DEFENDANTS IN ERROR.

Practice in Supreme Court. The plaintiff in error filed a petition in error in the supreme court, upon which a summons in error was issued and served on the defendant, but failed to file a transcript of the proceedings of the trial court. The defendant afterwards filed a motion to dismiss for the failure to file a transcript, and served notice upon the plaintiff's attorney of the pendency of such motion. *Held*, That the motion must be sustained.

MOTION to dismiss.

M. V. Moudy, for the motion.

George D. Meiklejohn and C. E. Magoon, contra.

MAXWELL, CH. J.

On February 7, 1887, the plaintiff in error filed his petition in error in this court. The summons in error seems to have been issued, served, and returned. No transcript, however, has ever been filed, and the attorney of the defendant in error now moves to dismiss the proceeding in error, principally upon the ground that no transcript has been filed. This motion was heard after notice had been given to the plaintiff in error of the pendency thereof. The motion must be sustained. There being no transcript filed, there is nothing before the court except the petition in error, and the time having elapsed in which the plaintiff could file the transcript, his rights in that regard are barred.

JUDGMENT ACCORDINGLY.

THE other judges concur.

ELIZA H. BROWN, APPELLEE, v. DANIEL BROWN, APPELLANT, AND FIRST NATIONAL BANK OF LINCOLN.

Husband and Wife. A contract between a husband and wife, whereby he transfers his property to her upon condition that she will assume his debts and pay the same out of the property received from him and property inherited from her father, is valid as against the husband.

APPEAL from the district court of Lancaster county.
Tried below before POUND, J.

Ryan Brothers, for appellant, cited: *Wallingford v. Burr*, 15 Neb., 207. *McDonald v. Hewitt*, 15 John., 349. *Joyce v Adams*, 4 Seld., 291. Langdell's Select Cases, 464, 529, 1010. Benj. on Sales, Sec. 374-5. *Shindler v. Houston*, 1 N. Y., 261. *Cooke v. Millard*, 5 Lans., 243. *Artcher v. Zeh*, 5 Hill, 205.

Mason & Whedon, for appellee.

MAXWELL, CH. J.

In June, 1886, the plaintiff filed a petition in the district court of Lancaster county, in which she alleged that she is a married woman, and that the defendant, Daniel Brown, is her husband; that in February, 1886, her husband was indebted to one W. G. Hawkins in the sum of \$11,000, and to other parties in the sum of \$725, which sums were then due, and said creditors were pressing her husband for payment; that the indebtedness to Hawkins was for 900 sheep, purchased in 1885, for the sum of \$3,500, which was secured by a mortgage on the sheep; that her husband at various times had borrowed from Hawkins divers sums, the dates and the amounts of which were unknown to the plaintiff, and to secure to said Haw-

kins the payment thereof transferred to him the contract for purchase of section 17, town 9, range 5 E., in Lancaster county; that Hawkins thereafter made the payments on said contracts as they became due and also paid the taxes thereon, by reason of which her husband was indebted to said Hawkins in February, 1886, as aforesaid; that in January, 1885, the plaintiff came into the possession of an estate inherited from her father of the value of about \$10,000; that in February, 1886, and for a long time prior thereto, said Hawkins pressed his claims for payment, whereupon it was agreed between the plaintiff, her husband, and said Hawkins, that plaintiff should assume said indebtedness, together with the other debts heretofore referred to; that she did so assume said debts, and paid said Hawkins of her own money the sum of \$1,075, and gave him a mortgage for the sum due on section 17 aforesaid, and certain real estate inherited from her father; that she has paid of the debts of her husband \$1,800 in cash, and is further liable therefor in the sum of \$10,000; that in consideration of plaintiff assuming and paying said debts, her husband sold and transferred to her all his interest in their household goods, also two horses, one pony, one cow, one yearling calf, one set of harness, one Moline wagon, one mower, one hay rake, one cultivator, one plow, one harrow, one hay rick, and about 900 sheep and about 200 lambs, and one-half interest in a corn-planter; that Hawkins sold and assigned the aforesaid contract to her, and the plaintiff then obtained a deed for the land, which was then mortgaged to Hawkins to secure the amount due to him; that in June, 1886, her husband, without her consent and in violation of her direction, shipped to persons unknown to plaintiff the wool sheared from said sheep and has received an advance thereon of about \$543, which he has deposited in his own name in the First National Bank, and threatens and is about to dispose of the personal property heretofore set out, which will prevent the plaintiff

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from properly caring for, cultivating, and increasing the crop now growing on section 17; that her husband is wholly insolvent, and is financially wholly worthless, thriftless, and shiftless. The prayer is for an injunction restraining her husband from receiving the money on said draft, and from meddling, interfering, or in any manner disposing of said personal property, and from hindering and disturbing the plaintiff in the free use and disposition of the same, etc.

The defendant Brown has filed a very lengthy answer, which need not be noticed here. On the trial of the cause the court found "that the plaintiff, Eliza H. Brown, is entitled to one-half of the said sum of five hundred and forty-three and $\frac{20}{100}$ dollars, now in the possession of the said defendant bank, to-wit, the sum of two hundred and seventy-one and $\frac{80}{100}$ dollars, and find that the defendant, Daniel Brown, is entitled to the other half of said sum of money, being also the sum of two hundred and seventy-one and $\frac{80}{100}$ dollars, and that the defendant, the First National Bank of Lincoln, Nebraska, should pay the said sum of money in its possession, one-half of the same to said plaintiff and one-half to said defendant Brown, as aforesaid, and that the said plaintiff and the said defendant Brown should pay the costs of suit, each of said parties to pay one-half of said costs," and rendered a decree accordingly.

The defendant appeals. There is a supplemental answer filed by the defendant, in which it is alleged that the plaintiff, since the bringing of the action, has sold eleven hundred of the sheep, of the value of \$3,300, one horse of the value of \$200, the corn on one hundred and twenty acres of said section 17, of the value of \$5 per acre, one horse and pony, of the value of \$75, and one cow and calf, of the value of \$80, being part of the property described in the petition.

It appears from the testimony that the plaintiff and

defendant were married about twenty-five years ago, and that two sons were born to them; that in March, 1881, the defendant and oldest son came to this state, the son at that time being about sixteen years of age; that the defendant Brown purchased the section of land in controversy from the B. & M. R. R. Co., and made the first payment thereon, amounting to between eight hundred and nine hundred dollars; that the defendant brought about \$4,500 in money to this state, which seems to have belonged to his father; that in June, 1881, the plaintiff came to this state to join her husband. The oldest son seems to have been sick before her arrival, and soon afterwards died. The youngest son at that time was about eleven years of age. The amount of improvement made by the defendant upon the section in question does not very clearly appear, but he seems to have erected a dwelling-house and a large shed for the protection of stock, and broken up one hundred and twenty acres of the land. This shed the plaintiff caused to be removed from the land and placed on a lot in the city of Lincoln. Soon after purchasing the land in controversy, the defendant purchased nine hundred sheep from Hawkins for \$4,500, and borrowed of him \$800 to pay for feed and other things, and to secure Hawkins executed a chattel mortgage upon the sheep, and also assigned the land contract, upon which Hawkins made four payments of principal and interest, the last payment being made one year before it was due. The plaintiff lived with the defendant on the farm for some time, but early in the winter of 1881-82 removed to Lincoln, as she claims, for the purpose of educating her son, and obtained employment as clerk in a store, and for a large portion of the time from the date of removing to Lincoln until the bringing of this suit, she remained in Lincoln as clerk in a store, and supporting herself and son. She and her husband, however, seem to have been on intimate and friendly terms, and, as far as the testimony tends to show,

Brown v. Brown.

the arrangement was only temporary. The testimony of a number of the neighbors of the defendant show that he resided on the land in question, and was a good farmer, and held in esteem by his neighbors. The testimony does not show, but it is apparent from the circumstances, that the sheep had been purchased at a high price, and that the many expenses incident to opening up a new farm made a heavy drain upon his resources, while the continued absence of his wife prevented the practice of such economy in household management as probably otherwise would have obtained. In February, 1886, Hawkins was pressing his claim against the defendant for payment, and as he was unable to meet the obligations, the plaintiff proposed to assume the debts, upon the defendant surrendering all claim to the property. This he assented to. There is no question between creditors and the plaintiff, the only question being as to the validity of the contract between the husband and wife. So far as we can see, the contract was deliberately entered into, and no sufficient cause has been shown, either in the pleadings or proofs, for setting it aside. It may indeed be questioned if the plaintiff's disposition of the personal property was for the best interest of the parties. It all seems to have been sold for much less than its value, but under the contract the plaintiff had unlimited power of disposing of such property. It is difficult to perceive, therefore, under the evidence in this case, what relief can be granted to the defendant, there being no such grounds either pleaded or proved. The judgment will be affirmed. It is probable that if an action was brought by the defendant to redeem, and offering to pay the entire debt and interest, that he would be entitled to relief, but that question is not before the court.

JUDGMENT AFFIRMED.

THE other judges concur.

JOSHUA P. BROWN, APPELLEE, v. GEORGE A. BAKER
ET AL., APPELLANTS.

1. **Mortgage Foreclosure:** CONSIDERATION: EVIDENCE: In an action to foreclose a mortgage given for part of the purchase money, the defenses were failure of consideration and fraudulent representations in the sale of the property. *Held*, That the proof failed to establish the defenses.
2. ———: PRIORITY OF LIENS. Where it is sought to give the lien of a junior mortgage precedence over the lien of a senior mortgage, the claim must be based either on an agreement to that effect or on the superior equity of the junior mortgage.

APPEAL from the district court of Saunders county.
Heard below before Post, J.

Ryan Brothers and *J. R. Gilkeson*, for appellants, cited :
Greenleaf Evidence, Sec. 200.

George I. Wright and *William C. Wright*, for appellee,
cited : *Cooley Torts*, 487, 496, 503. 1 *Wash. Real Prop.*,
576. 1 *Parsons Contracts*, 619.

MAXWELL, CH. J.

This is an action to foreclose a mortgage given by George A. Baker and wife to the plaintiff, in March, 1884. The defense is, first, want of consideration, and second, fraudulent misrepresentations of the plaintiff in regard to the property purchased. On the trial of the cause in the court below a decree was rendered for the full amount of the mortgage, from which the defendant appeals. The property mortgaged consists of a mill propelled by water, and prior to 1881 is alleged to have been of the value of \$10,000. The mill is situated on the Platte bottom in Saunders county, some distance below the bridge of the

Omaha & Republican Valley R. R., and in the ice gorge in the spring of 1881, immediately above the bridge the water of the river was thrown out of the bed of the river onto the bottom, on the south side thereof, and over and along the stream, the water of which had formerly been used to propel this mill, and destroyed the dam, covered the machinery with sediment, and to a great extent destroyed the water power of the mill.

The principal contention of the defendant is, that these facts were concealed from him, and that he purchased the mill upon the sole representations of the plaintiff. In this, however, he is not borne out even by his own testimony. A number of letters of the defendant to Brown are in the record, but one of which need be noticed. The first letter is dated in January, 1884, and is as follows:

“LINCOLN, NEB., Jan. 31, '84.

“*J. P. Brown, Esq., Clear Creek, Neb.:*

“DEAR SIR—Yours of the 29th rec'd. I cannot accept your proposition. I think I gave you a large offer. I have not the least doubt that the land I offer you is good prairie land. It is situated in Floyd Co., Texas. As regards the title, it was a railroad grant and I got it from an agent on a script from the state signed by the governor of Texas, and it has the state seal. Your property is surely all run down, and it will take time and money before it will pay any profit. I saw the man that I sent up there (who is a genuine business man); he was not very favorably impressed with it, but when I make an offer I make it on my own responsibility. I have written to those other parties I spoke of, for prices and terms, and shall take a little time to consider which shall be the best thing to do. I hardly believe in partnership business well enough for to go in with an entire stranger. I believe you said if you sold you would put the mill in running order, that is what I would expect; I could not handle the property now without you could take the land. I do not like

Brown v. Baker.

to let it go so cheap as I offered it to you, for I think in five years it will be worth as much as the mill. My wife's folks live at Beatrice, and they do not want us to go farther away. Please consider my offer and let me know what you can do. I have done my best. Yours Truly,
"GEO. A. BAKER, Lincoln, Nebraska."

Some months after Baker had purchased and taken possession of the property, the plaintiff called upon him, when the following conversation took place: "Mr. Baker, do I understand that you say that I misrepresented this property to you when I sold it to you?" To which Baker answered: "No, no, Mr. Brown, not at all; you didn't but that damned old gray-headed Safford did. Didn't I state to you or tell you how this property was? You did, as near as I could do it myself."

This testimony is not denied by Baker, who says that he does not remember to have said so. It is evident, however, that he did use substantially the very language imputed to him by Brown. Upon the whole testimony it is clear that there were no fraudulent representations made to Baker, to induce him to purchase the property in question. The machinery had a certain intrinsic value, as also the building, aside from their use for milling purposes, and there is testimony in the record tending to show that Baker desired to move the mill to another county and erect it on a water-course there. The decree of the district court, therefore, practically finding that there was a consideration (and no fraud) affecting the sale, is affirmed.

The testimony shows that \$760 of the money paid by Geo. A. Baker to the plaintiff was procured from his brother, James A. Baker, and that a mortgage to secure the same was executed upon the property in controversy in this case in May, 1884. It is sought now to declare the lien of James A. Baker for the \$760 superior to that of the plaintiff. There is no proof, however, that such an arrangement was in the contemplation of the parties or any

Armstrong v. Middlestadt.

of them when the mortgages were executed, nor is there any proof showing James A. Baker's equity to be superior to that of the plaintiff.

There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

WILLIAM ARMSTRONG, PLAINTIFF IN ERROR, V. JARGUS
MIDDLESTADT, DEFENDANT IN ERROR.

22	711
62	849

1. **Foreclosure of Tax Lien: SERVICE BY PUBLICATION.**

Where in an action to foreclose a tax lien on real estate, the petition and affidavit for publication were duly sworn to on the 5th day of March, 1883, in Madison county, Nebraska, and filed in the office of the clerk of the district court of Pierce county on the succeeding day, *Held*, That the affidavit for publication was sufficient to authorize service on the defendant by publication.

2. **Service by Publication.** Where by notice by publication a defendant was required to answer on the forenoon of the day on which by law the answer should have been filed, *Held*, That the notice was not therefore invalid, but that the defendant had the entire day in which to answer.

3. **Judicial Sale: CONFIRMATION: NOTICE.** The ten days' notice to the adverse party, provided in section 498 of the code, is necessary in all cases where it is sought to confirm a sale of real estate in vacation. Such notice is jurisdictional, and unless it has been given no valid confirmation can be had in vacation.

ERROR to the district court for Pierce county. Tried below before TIFFANY, J.

C. C. McNish and Brome, White & Mapes, for plaintiff

in error, cited: *Murphy v. Lyons*, 19 Neb., 689. *Forbes v. Hyde*, 31 Cal., 342. *Ellis v. Karl*, 7 Neb., 381. *Blair v. West Point Mfg. Co.*, 7 Id., 146. *McGavock v. Pollock*, 13 Id., 536. *In re Dill*, 32 Kan., 668.

A. N. Childs and *N. A. Rainbolt*, for defendant in error, cited: *Crowell v. Johnson*, 2 Neb., 156. *Neligh v. Keene*, 16 Id., 408. *Tracy v. Sacket*, 1 Ohio State, 54.

MAXWELL, CH. J.

In September, 1885, the plaintiff brought an action in the district court of Pierce county to recover the possession of one hundred and sixty acres of land. The defendant claimed title to forty acres of the land in controversy under a tax deed, and to the remainder of the tract, being one hundred and twenty acres, by virtue of the foreclosure of certain tax liens and a deed under the decree of foreclosure. On the trial of the cause the court rendered a decree for the plaintiff for the forty acres which the defendant claimed under a tax deed, and for the defendant for the one hundred and twenty acres which he claims under the foreclosure proceedings.

The plaintiff contends that the sheriff's deed under the tax foreclosure is void, for the following reasons:

First, the petition and affidavit for service by publication in the foreclosure action were filed in the district court of Pierce county on the 6th day of March, 1883, and both were sworn to on the preceding day; *Second*, that the publication notice was insufficient; and *Third*, want of authority to confirm the sale.

The record shows that the petition and affidavit for service by publication in the tax foreclosure action were sworn to in Madison county on the 5th day of March, 1883, and filed in the office of the clerk of the district court of Pierce county on the succeeding day.

Section 78 of the code provides that, "before service can

be made by publication an affidavit must be filed, that service of a summons cannot be made within this state on the defendant or defendants to be served by publication, and that the case is one of those mentioned in the preceding section. When such affidavit is filed the party may proceed to make service by publication."

It will be seen that the statute does not require the petition to be filed before the affidavit is made. Fairly construed, we think that the act of verifying the petition, making the affidavit for publication, and the instituting of the action by filing the same in the office of the clerk of the district court of Pierce county, may be regarded as continuous acts in the bringing of the action to foreclose the tax liens. For aught that appears, the petition may have been verified and the affidavit for publication made late at night on the 5th day of March, 1883; and may have been filed in the office of the clerk of the district court of Pierce county soon after midnight, or early in the morning of the 6th day of March of that year. It must be presumed, too, if the defendant Culver was a non-resident of the state on the 5th day of March he continued to be such on the 6th. The affidavit for publication, therefore, was sufficient, and the objections raised to it are overruled. In sustaining this affidavit we do not wish to go beyond the facts in this case, and to hold that an affidavit made several days before the commencement of an action would be sustained. The affidavits in any case are merely *prima facie* evidence of the facts stated therein, and the defendant, notwithstanding, may show that he was a resident of the state and that service of summons might have been had upon him therein. The plaintiff in error, however, corroborates the affidavit in this case by introducing a deed to the land in controversy from Culver and wife to Armstrong, which deed shows Culver to be a resident of the state of Illinois.

2. The notice of publication in the foreclosure action

required the defendant to answer the petition on or before the 23d day of April, 1883, that being the proper answer day. It may be conceded that it was not in the power of the plaintiff to shorten or abridge the time in which the defendant could answer the petition, and notwithstanding the notice required him to answer in the forenoon, the right continued during the entire day. The defendant seems to have sustained no injury in consequence of the giving of this notice, and at most it was error without prejudice.

3. The third question presented is more serious. The motion and order confirming the sale are as follows:

"IN THE DISTRICT COURT OF PIERCE COUNTY, STATE OF NEBRASKA.

"Jargus Middlestadt v. The east half of the south-west quarter and the north-east quarter of the south-west quarter of section twenty- four, township twenty-five, range two W. 6 P. M., and George N. Culver.) Motion for order to con- firm sale and for deed.
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"Comes now plaintiff, and moves the court to issue an order in vacation confirming the sale of said real estate, and directing the sheriff of said county to make and deliver deed to the purchaser of said land without plaintiff being required to give notice of ten days to adverse party or his attorney, as provided by section 498, page 595, Compiled Statutes of Nebraska, for the reason that the owner of said land is unknown, and the residence of the said defendant Culver is unknown, and for the further reason that the summons in this action was served by publication.

"And now on this 11th day of December, 1883, this cause coming on to be heard in vacation, upon the return of the sheriff to the order of sale issued herein, and the report of the proceedings and the sale of said lands and tenements under said order of sale, and upon the motion of plaintiff for the confirmation of said sale and for order

to the sheriff to make purchaser a deed to said lands, the court finds that summons in this cause was served by publication; that the owner of said land is unknown; that the residence of defendant Geo. N. Culver is unknown; that no appearance in this cause has been made by or on behalf of said defendant land or of said defendant Culver, and that the ten days' notice to adverse party or his attorney of record, as provided by section 498, page 595, Compiled Statutes of Nebraska, 1881, for confirmation of sale, is not required to be given in this case, and the court, after having examined the proceedings in relation to said sale, and being satisfied that the same has in all respects been made in conformity with law, and that said sale is legal, it is hereby ordered that said sale and proceedings be and the same are hereby confirmed, and the sheriff of the said county of Pierce is hereby ordered to make to the purchaser a deed in fee simple for the lands and tenements so sold, and the clerk of the court for said Pierce county is hereby directed and required to enter on the journals of this court this present order.

"Done at chambers, at Albion, this 11th day of December, 1883.

"F. B. TIFFANY, *Judge.*"

Section 498 of the code provides that: "If the court, upon the return of any writ of execution or order of sale, for the satisfaction of which any lands and tenements have been sold, shall, after having carefully examined the proceedings of the officer, be satisfied that the sale has in all respects been made in conformity to the provisions of this title, the court shall direct the clerk to make an entry on the journal that the court is satisfied of the legality of such sale, and an order that the officer make to the purchaser a deed of such lands and tenements; and the officer, on making such sale, may retain the purchase money in his hands until the court shall have examined his proceedings as aforesaid, when he shall pay the same to the person entitled thereto,

agreeable to the order of the court; *Provided*, That the judge of any district court may confirm any such sale at any time after such officer has made his return, on motion and ten days' notice to the adverse party or his attorney of record, if made in vacation. When any sale is confirmed in vacation the judge confirming the same shall cause his order to be entered on the journal by the clerk."

It will thus be seen that the right of the judge to confirm a sale in vacation is derived from a special provision, conditioned that it shall be made on ten days' notice to the adverse party or his attorney of record. This notice is jurisdictional, and unless it has been given a judge has no authority to confirm a sale in vacation. There are many reasons why the court should strictly adhere to this rule. The property may have been appraised at a sum greatly beneath its value; liens may have been included which had been satisfied or released; mistakes may have been made by the appraisers to the detriment of the land-owner. The sale, until confirmed, is open to all just objections against its regularity and fairness, and every opportunity should be given to the party about to be deprived of his land to present any valid reasons against the confirmation of the sale. Therefore if the facts do not exist which authorize a confirmation in vacation, then no such confirmation can be had, and the motion to confirm cannot be acted upon until the sitting of the court. The confirmation of the sale, therefore, being without authority of law, is void, and there being no valid confirmation the sheriff's deed is ineffectual to convey the title.

The judgment of the district court is therefore reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

NEWLEAN & HOARD, PLAINTIFFS IN ERROR, V. OLE
OLSON, DEFENDANT IN ERROR.

1. **Chattel Mortgage: CONSTRUCTION: SALE BY MORTGAGEE.**

A chattel mortgage, like any other instrument, is to be construed together. The whole instrument is to be viewed and compared in all its parts, so that every part of it may be made consistent and effectual. Therefore where the mortgage provides that the debt shall draw interest and the debt is to be paid at certain times named, and thereby there is an implied agreement that the mortgagor shall remain in possession of the property until there is a default in the payment of the money or some part thereof, a provision in the mortgage that, "If the mortgagee shall at any time feel unsafe or insecure he may seize and sell, as aforesaid, the property," will not authorize such mortgagee without cause to seize and sell such property before the debt becomes due.

2. ———: ———. The words "feels unsafe and insecure" do not mean that he may exercise an arbitrary discretion in the premises, but the mortgagor must be about to do or has done some act which tends to impair the security of the mortgagee.

ERROR to the district court for Burt county. Tried below before HOPEWELL, J.

T. L. Lewis, for plaintiff in error, cited: *Adams v. Neb. City Nat'l Bank*, 4 Neb., 370. *Ahlman v. Meyer*, 19 Neb., 68. *Jones Chattel Mort.*, Sec. 426. *Huebner v. Koebke*, 42 Wis., 319. *Smith v. Post*, 1 Hun, 516. *Wells v. Chapman*, 13 N. W. R., 842. *Robinson v. Fitch*, 26 Ohio State, 663.

H. H. Bowes, for defendant in error, cited: *Roy v. Goings*, 96 Ill., 361. *Jones Chattel Mort.*, Sec. 431.

MAXWELL, CH. J.

On the 25th of September, 1886, the defendant in error purchased from the plaintiff one Moline spring wagon, one Henney top buggy, and one Deere, Wells & Co. top buggy,

28	717
31	807
32	188
32	717
33	217
32	717
35	732
32	717
40	897
32	717
49	748

Newlean & Hoard v. Olson.

and to secure the payment of the same executed and delivered to the plaintiff in error three instruments, alike except as to the time of payment, the first one of which is as follows :

“\$100.

OAKLAND, NEB., Sept. 25, 1886.

“On or before the first day of March, 1887, for value received in two buggies and one spring wagon, the undersigned, living miles of Oakland postoffice, county of Burt, state of Nebraska, promises to pay to Newlean & Hoard, or order, one hundred dollars, at Oakland, with interest from date until paid, at the rate of ten per cent per annum. For the purpose of obtaining credit, I certify that I own in my own name in fee simple acres of land in section ..., town ..., range ..., county of, state of, with acres improved, worth \$....., which is not encumbered by mortgage or otherwise, except \$..... due, 188... I also own \$2,000 worth of personal property over and above all indebtedness and exemptions. For value received, I, the undersigned, do hereby sell and mortgage unto the payee hereof, to secure the payment of the above described note, one Moline spring wagon, one Henney top buggy, one Deere, Wells & Company top buggy, all with poles, two sorrel horses, bald face, eight and nine years old, now in my possession. Provided that if the undersigned shall pay the said debt, then this mortgage shall be void. In case of default, I authorize the said mortgagee to seize and sell the said property at public or private sale, as they may elect, and pay the said debt with expenses incurred ; or if the mortgagee shall at any time feel unsafe or insecure, they may seize and sell, as aforesaid, the property. Sale to take place at Oakland, Nebraska. If from any cause said property shall fail to satisfy said debt and expenses, I covenant and agree to pay the deficiency.

“OLE OLSON.

“Witness: A. D. PETERSON.”

The Henney buggy proved defective and was returned to the plaintiff in error, and the third of these instruments was canceled, and the balance, being thirty dollars, was to be indorsed upon one of the other instruments. The indorsement was not made, however. About the first of December, 1886, the plaintiff in error obtained possession of the horses and buggies upon the pretext that he felt insecure.

The defendant in error thereupon brought an action of replevin, upon the ground that he was entitled to the possession of the property at least until default was made in the payment of one of the instruments, and on the trial of the cause a jury was waived and the cause submitted to the court, which found in favor of the defendant in error and rendered judgment accordingly.

The testimony tends to show that Olson was engaged in the livery business at Oakland, Burt county; that his receipts from his business were from \$5 to \$7.50 per day; that he purchased the buggies in question for use in his business, and the plaintiff was well aware of that fact; the lien upon the horses was taken as additional security, that in case Olson made default in the payment of the money the plaintiff would be amply secured.

The plaintiff claims that under the clause in the instrument above set out, "If the mortgagee shall at any time feel unsafe or insecure they may seize and sell, as aforesaid, the property," he had the right to take possession at any time he saw fit, and that this right did not depend upon the facts, but upon his own pleasure or election.

A chattel mortgage, like any other contract, is to be construed together, and the object is to ascertain with precision the mutual understanding of the parties. The whole instrument is to be viewed and compared in all its parts so that every part of it may be made consistent and effectual. 2 Kent's Com., 555. *People, ex rel., v. Gooper*, 3 Neb., 285. *Barton v. Fitzgerald*, 15 East., 541.

Merrill v. Gore, 29 Me., 346. And the court in construing the contract should give effect to the provisions which carry out the evident intent of the parties. Here we find in this case credit was given, interest provided for in favor of the mortgagee, and an implied agreement on his part that, if the mortgagor did not impair the security, he should be entitled to retain possession of the property until the money became due. This clearly was the contract and the intent of the parties, and the mortgagee should not be permitted to violate it. The words, "if the mortgagee shall at any time feel unsafe or insecure," do not mean that he may arbitrarily and without cause declare that he feels unsafe or insecure. If this were so a mortgagee might induce a mortgagor amply to secure a debt upon the implied promise that credit for a certain length of time would be given, and the instant after receiving the mortgage declare that he felt unsafe and insecure and proceed at once to foreclose the mortgage. Such a rule would place the mortgagor entirely at the mercy of the mortgagee, and in many, if not most cases, deprive the mortgagor of the very means by which he could pay the debt. To justify the mortgagee, therefore, in his action in declaring that he feels unsafe and insecure, where there is an implied contract that the mortgagor shall remain in possession, the mortgagor must be about to commit, or has committed, some act which tends to impair the security; and unless such facts exist the right does not become operative.

The judgment of the district court, therefore, is clearly right, and is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

**UNION PACIFIC RAILROAD COMPANY, PLAINTIFF IN
ERROR, V. IRA D. MARSTON, DEFENDANT IN ERROR.**

1. **Appeal from Justice: FILING TRANSCRIPT: NEGLIGENCE.**
An agreement entered into by an attorney with a justice of the peace, that such justice shall file a transcript of the proceedings of a case tried before him, in the district court, will not, upon the failure of the justice to file the transcript, relieve the appellant from the consequence of such neglect.
2. ——— : ——— : ———. In such case, the duties not being official, the justice acts as the mere agent of the appellant.
3. ——— : ———. Under sections 1,008 and 1,011 of the code, as it existed in 1886, an appellant had thirty days from the rendition of the judgment before the justice in which to file his transcript in the district court, and until the second day of the next term of the district court after the expiration of the thirty days.
4. ——— : ———. Where a transcript is filed by either of the parties on or before the thirtieth day after the rendition of the judgment, the court will thereby acquire jurisdiction of the case.

ERROR to the district court for Buffalo county. Tried below before HAMER, J.

W. R. Kelley, for plaintiff in error, cited: *Dobson v. Dobson*, 7 Neb., 299. *Horn v. Miller*, 20 Id., 103. Sec. 1001, Civil Code.

Ira D. Marston, pro se, cited: *Wilson v. Starks*, 2 Southwestern Rep., 346.

MAXWELL, CH. J.

On the 15th day of November, 1886, a judgment was rendered before a justice of the peace in Buffalo county in favor of the defendant in error, and against the plaintiff, for the sum of \$40 and costs. On the 25th day of that month the railway company filed a bond for appeal and ordered

29	721
23	562
25	721
29	423
29	721
30	656
29	721
33	459
22	721
34	572
22	721
55	651

a transcript of the proceedings. The first day of the term of the district court next after the appeal was taken was on the 13th day of December, 1886. The transcript was filed on the 15th day of that month, being the third day of the term and the thirtieth day after the rendition of the judgment before the justice. The appellee then moved to affirm the judgment of the justice, upon the ground that the appellant had failed to file its transcript by the second day of the term. The motion was sustained and judgment entered in the district court for the sum of \$40 and costs. On the 22d day of that month, the railway company filed a motion to have the default set aside, upon the ground, first, that the transcript had been filed within the thirty days; and second, because the attorney of the company had made an agreement with the justice before whom the cause was tried to file the transcript within the proper time. A number of affidavits are set out in the record in support of or against the second point in the motion. These affidavits are in duplicate in the record, and the costs for the same will be taxed to the party at fault. Even if it was true that the company's attorney had made an arrangement with the justice to file a transcript, such agreement would not be recognized by this court, and would not excuse the failure to file the transcript within the time required. *Gifford v. Republican Valley & Kansas R. R. Co.*, 20 Neb., 538. It is no part of the duties of a justice to file a transcript of the proceedings of a case tried before him, and if a party employs him to file the same, his duties in that regard, not being official, will be rendered simply as agent. The failure of the agent to file a transcript will not relieve a principal from the consequences of such neglect. The affidavits, therefore, on both sides were entirely unnecessary, and will not be considered in this case.

Section 1,008 of the code provides that, "the said justice shall make out a certified transcript of his proceedings, in-

cluding the undertaking taken for such appeal, and shall, on demand, deliver the same to the appellant, or his agent, who shall deliver the same to the clerk of the court to which such appeal may be taken within thirty days next following the rendition of such judgment; and such justice shall also deliver or transmit the bill or bills of particulars, the depositions, and all other original papers, if any, used on the trial before him, to such clerk, on or before the second day of such term; and all other proceedings before the justice of the peace in that case shall cease and be stayed from the time of entering into such undertaking."

Section 1,011 of the code as it existed when the trial in the court below took place, provided that, "If the appellant shall fail to deliver the transcript and other papers, if any, to the clerk, and have his appeal docketed as aforesaid, on or before the second day of the term of the said court next after such appeal, the appellee may, at the same term of said court, file a transcript of the proceedings of such justice, and the said cause shall, on motion of the appellee, be docketed; and the court is authorized and required, on his application, either to enter up a judgment in his favor, similar to that entered by the justice of the peace, and for all costs that have accrued in the court, and award execution thereon; or such court may, with the consent of such appellee, dismiss the appeal, at the cost of the appellant, and remand the cause to the justice of the peace, to be thereafter proceeded on as if no appeal had been taken; and if the plaintiff in the action before the justice shall appeal from any judgment rendered against such plaintiff, and after having filed his transcript and caused such appeal to be docketed, according to the provisions of this chapter, shall fail to file his petition, or otherwise neglect to prosecute the same to final judgment, the said plaintiff shall become non-suited, and it shall be the duty of said court to render judgment against said appellant for the amount of the judgment rendered against him by the

justice, together with interest accrued thereon and for costs of suit, and to award execution therefor as in other cases."

It will be seen that here are two provisions regulating the time of filing a transcript. They were not inconsistent, however. The appellant was given thirty days in which to file a transcript, then if the transcript was not filed on or before the second day of the term next after the expiration of the thirty days, the appeal might be dismissed or the appellee might file a transcript and ask for the relief provided in the statute—that is, the appellant in any case had at least thirty days from the time of the rendition of the judgment before the justice in which to file his transcript, and was not in default if he failed to file the same on or before the second day of the next term of the district court, although the time intervening might greatly exceed thirty days. The statute in that regard was modified at the last session of the legislature.

Where a transcript is duly filed by one of the parties during the thirty days given by statute, the appellate court will acquire jurisdiction, and it will be its duty to proceed and try the case in the manner pointed out in the statute. A certain number of days are given in which to file a petition and make up the issues, and the judgment in this case was rendered before the time in which the petition should have been filed had elapsed, and before a petition had actually been filed. The court, therefore, erred in overruling the motion of the plaintiff in error to set aside the default, and in affirming the judgment of the justice. But even if the filing of the transcript did not give the court jurisdiction of the appeal, still the railway company was not in default, as it still had until the second day of the next term of the district court in which to file the transcript. In any view of the case, therefore, the court erred, and the cause is reversed and remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

JACOB W. PERKINS, PLAINTIFF IN ERROR, V. DUNHAM
M. STRONG, DEFENDANT IN ERROR.

22	725
35	743
29	725
56	619

Real Estate: RECORDING DEEDS: NEGLIGENCE OF RECORDER. A purchaser of real estate who takes his deed to the office of the register of deeds and deposits it with him for record, and pays the fees for recording and entering the same on the numerical index, discharges thereby his duty of notice to the public; and if, through the fault alone of the register, the deed is lost or mislaid, and not entered of record or entered on the index, such failure will not work to the prejudice of the title of such purchaser, even in favor of a subsequent purchaser without actual notice. *Lee v. Birmingham*, 30 Kan. R., 312.

ERROR to the district court for Dodge county. Tried below before POST, J.

Frick & Dolezal, for plaintiff in error, cited: *Poplin v. Mundell*, 27 Kan., 138. *Merrick v. Wallace*, 19 Ill., 486. *Kiser v. Houston*, 38 Id., 252. *Brooke's Appeal*, 64 Penn. State, 127. *Gill v. Fauntleroy*, 8 B. Mon., 177. *Jordan v. Hamilton Co. Bank*, 11 Neb., 501. *Mutual Life Ins. Co. v. Dake*, 87 N. Y., 257.

W. H. Munger, for defendant in error, cited: *Barney v. McCarthy*, 15 Iowa, 510. *Whalley v. Small*, 25 Id., 184. *Sawyer v. Adams*, 8 Vt., 172. *Speer v. Evans*, 47 Penn. State, 144. *Handley v. Howe*, 22 Maine, 560.

COBB, J.

This was an action by the plaintiff in error against the defendant in error in the district court of Dodge county. The action was ejectment. There was issue and, by stipulation, a trial to the court, with a finding and judgment for the defendant. The plaintiff brings the cause to this court on error, and assigns the following errors:

1. The finding and decision of the court is not sustained by sufficient evidence.

2. The finding and decision of the court is contrary to law.

3. The court erred in overruling the motion for a new trial.

The cause was tried upon an agreed statement of facts, which I copy from the bill of exceptions, as follows:

"On the 11th day of August, 1879, one Edward Johnson, being the owner in fee simple of lots 1 and 2 in block 20, in the town of North Bend, in Dodge county, for a valuable consideration to him paid, jointly with his wife, Mary Johnson, duly executed to the plaintiff a deed of general warranty, witnessed and acknowledged as required by law, whereby he conveyed to the plaintiff said lots 1 and 2, in fee simple, with the usual covenants of seizin against incumbrances and for quiet enjoyment.

"2. On said 11th day of August, 1879, said Mary Johnson, being then the owner in her own right in fee simple of lots 3 and 4 in block 20, in said town of North Bend, for a valuable consideration to her paid, jointly with her husband, the said Edward Johnson, duly executed and delivered to the plaintiff a deed of general warranty, witnessed and acknowledged as required by law, a copy of which is hereto attached, marked exhibit 'B,' and made a part hereof.

"3. On the 6th day of December, 1879, in the county clerk's office of said Dodge county, the plaintiff duly presented and delivered said deeds, and each of them, to the county clerk of said county for record, as provided by law, and paid to said county clerk the fees required by law for the recording of said deeds and for entering them on the indexes, and said county clerk then received said deeds for record and, at the same time, made on each of said deeds an endorsement, partly printed and partly written, in words and figures following: 'Received for record this 6th

day of December, 1879, at 9 o'clock A.M., and recorded in book T of deeds, page, Charles Sang, county clerk Dodge county, Nebraska.'

"4. That a few days after said 6th day of December, 1879, the plaintiff went away from said Dodge county, and remained away continuously until the year 1882.

"5. On the 20th day of March, 1880, the said Edward Johnson, then being the owner in fee simple of the south $\frac{1}{4}$ of the north-west $\frac{1}{4}$ of section 12, township 18, range 5, in said Dodge county, for a valuable consideration to him paid, jointly with his wife, the said Mary Johnson, duly executed and delivered to one L. M. Keene and one L. D. Richards a deed of general warranty, witnessed and acknowledged as required by law, whereby he conveyed to said L. M. Keene and L. D. Richards said premises, and whereby he also pretended to convey to said L. M. Keene and L. D. Richards said lots 1, 2, 3, and 4. A copy of said deed is hereto attached, marked 'exhibit A,' and made a part hereof. The attorney in fact executing said deed for said Johnson had due and lawful authority and power to execute and deliver deeds conveying real estate owned by said Johnson, and to make covenants of warranty seizin against incumbrances and for quiet enjoyment therein.

"6. That at the time of the execution and delivery of said deed to said L. M. Keene and L. D. Richards, the said Edward Johnson had no right, title, or interest in and to said lots 3 and 4, except such as a husband has in the real estate owned by his wife in her own right, and said Edward Johnson has never owned nor acquired any right, title, or interest in and to said lots 3 and 4, but said lots 3 and 4 were owned in fee simple by said Mary Johnson in her own right, until she conveyed the same to plaintiff by deed as aforesaid.

"7. On the 17th day of April, 1880, said L. M. Keene and L. D. Richards, for a valuable consideration to them paid, duly executed and delivered to the defendant

their deed of general warranty, witnessed and acknowledged as required by law, whereby they pretended to convey to defendants said lots 1, 2, 3, and 4, in fee simple, with the usual covenants of seizin against incumbrances and for quiet enjoyment.

"8. That the said deed to said L. M. Keene and L. D. Richards was, on the 20th day of March, 1880, at the county clerk's office of said Dodge county, duly presented and delivered to the county clerk of said county for record, as required by law, and the fees required by law for recording and entering same on the indexes was paid to said county clerk, and said county clerk received the same for record and recorded said deed in book I of deeds, on page 169 thereof, in the records of said county, and entered the same on the indexes; and the said deed to defendant was, on the 17th day of April, 1880, at the county clerk's office of said county, duly presented and delivered to the county clerk of said county for record as required by law, and the fees required by law for recording and entering same on the indexes was paid to said county clerk, and said county clerk received the same for record and recorded the same in book I of deeds, on page 208 thereof, in the records of said county, and entered the same on the indexes.

"9. That, without the knowledge or consent of the plaintiff, the said county clerk neglected and failed to record, and also neglected and failed to enter on the indexes, the said two deeds to plaintiff, filed, delivered, and received for record and for entry on the indexes as aforesaid; and at the time of the execution, delivery, and record of said deed to said L. M. Keene and L. D. Richards, and of said deeds to defendant, the said deeds to plaintiff were not actually recorded at large on the records of said county, nor actually entered on the indexes, but the said deeds to plaintiff continuously remained in said county clerk's office of said county from the delivery of the same to said county clerk as aforesaid, to-wit, December 6, 1879, until the year

1882, during all of which time the plaintiff believed the same were actually recorded in their regular order and actually entered on the indexes, and relied thereon, and plaintiff did not discover nor learn of the neglect and failure of said county clerk to record or enter on the indexes his said deeds until the year 1882, when he returned to said county; then hearing that said defendant claimed ownership to said lots, plaintiff instituted a search in said county clerk's office and discovered said failure and neglect, and found his said deeds in said office; and plaintiff upon such search for the first time learned of the existence of the said deed to said L. M. Keene and L. D. Richards, and of said deed to defendant, at which time the considerations for said deeds to L. M. Keene and to defendant had passed, and plaintiff did not at any time before his said return to said county know that said L. M. Keene or L. D. Richards, or said defendant, or any one of them, were about or intending to take said deed or deeds, or to pay said consideration or considerations; but when plaintiff learned that defendant claimed ownership to said lots, said considerations were paid; and upon the discovery of said failure and neglect of said county clerk, plaintiff placed said matters in the hands of an attorney-at-law, with instructions to bring the proper action, and again left said county and has been away from said county ever since; the said attorney failed to bring action, and upon discovery thereof plaintiff placed said matter in the hands of other attorneys who procured the record of said deeds to be completed and brought action.

"10. That at the time of making and delivery and record of said deed to said L. M. Keene and L. D. Richards, and of said deed to defendant, and the paying of the considerations therefor, neither the said L. M. Keene nor said L. D. Richards, nor said defendant, had any actual notice of the said deeds to plaintiff, except such notice as the law may infer from the delivery of said deeds for record

and entry on the indexes as aforesaid, and their being and remaining in said county clerk's office as aforesaid.

"11. That at the time of the several purchases as before stated, by plaintiff and L. M. Keene and L. D. Richards, and also D. M. Strong, the said lots mentioned were unoccupied."

At the hearing we were all of the opinion that the judgment was wrong, and a thorough examination of the cases cited fails to enable me to sustain it. The sections of statute especially applicable to the question involved are §§ 15 and 16, chapter 61 of the General Statutes, page 875, as follows :

"Sec. 15. Every deed entitled by law to be recorded shall be recorded in the order and as of the time when the same shall be delivered to the clerk for that purpose, and shall be considered as recorded from the time of such delivery.

"Sec. 16. All deeds, mortgages, and other instruments of writing which are required to be recorded, shall take effect and be in force from and after the time of delivering the same to the clerk for record, and not before, as to all creditors and subsequent purchasers in good faith without notice; and all such deeds, mortgages, and other instruments shall be adjudged void, as to all such creditors and subsequent purchasers without notice whose deeds, mortgages, and other instruments shall be first recorded; *Provided*, That such deeds, mortgages, or other instruments shall be valid between the parties."

Counsel for defendant in error cites section 85 of the act entitled, "An act concerning counties and county officers," approved March 1, 1879, page 377, Session Laws of 1879, and under it claims that it was the duty of the plaintiff to have seen to it, at his peril, that his deeds were entered upon the numerical index before presenting the same for record.

The following is the section cited : "Sec. 85. It shall

be the duty of every person requiring any conveyance of realty, or interest therein, including mechanics' liens, to be entered upon said numerical index prior to the recording thereof, and no instrument shall be received for record by the county clerk until the same has been presented for transfer in said numerical index and the fees provided by law for so entering the same on said index have been paid."

Considering these provisions of law together, and in connection with the agreed statement of facts in the case, I think that the plaintiff discharged his entire duty in the premises. He presented the deeds for record and entry in the indexes, this included entry as well as "transfer" in said numerical index, "and paid the fees therefor." Practically this was all he could do. To require two separate and distinct acts on the part of the party, one to present his deed for entry and transfer in the numerical index, and after that is completed again present it to the same person for record, would render the administration of the law cumbersome, and in many counties impractical. It is the record of the deed, not the original, that is required to be indexed. An index, according to the dictionary, is that which points out; that which shows, indicates, or manifests. In ordinary use, it is a table of references, pointing out the page of a book where a certain article or subject may be found. When the article or subject to be pointed out is a record, how can this be done until the record has an existence, and has found a place on a certain page or pages of some book? A careful examination of the section last above quoted, especially if read as a part of the act of February 7, 1873, as it originally passed, cannot fail to show the purpose and object of the section to be, to compel the payment of fees, rather than to transfer the office of constructive notice from the record to the index.

Again, the deeds themselves, while lying in the clerk's office with fees for recording and indexing the same paid,

were notice, both in law and in fact, to all persons. I say they were notice in fact, because, notwithstanding the modern appliances of numerical indexes, entry books, and reception records, no experienced persons will deem a search complete until the unrecorded papers remaining in the office have been examined.

The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

CAMP & COMPTON, PLAINTIFFS IN ERROR, v. SAMUEL
SADLER, DEFENDANT IN ERROR.

1. **Action on Account: VERDICT.** Where in an action on an account and set-off the testimony is nearly equally balanced, the verdict will not be set aside as being against the weight of evidence.
2. **Sale: ORAL ACCEPTANCE OF ORDER FOR GOODS.** Where there is testimony tending to show that an order in favor of one S., upon the firm of C. & C., was orally accepted by said firm, and paid to S. in goods, it is not error for the court to refuse to instruct the jury that, notwithstanding the oral acceptance of said order by C. & C., they could sue said S. for the value of the goods obtained by him upon said order.

ERROR to the district court for Harlan county. Heard below before GASLIN, J.

John Dawson, C. C. Flansburg, and Ryan Bros., for plaintiff in error, cited: Birchell v. Neaster, 36 Ohio State, 331. Dows v. Swett, 120 Mass., 322. Reinheimer v. Carter, 31 Ohio State, 579.

James McNeny, for defendant in error.

MAXWELL, CH. J.

This is an action on an account which the plaintiff claims to have against the defendant. The defendant, in his answer to the petition, denied the facts stated therein, and alleged that the plaintiffs were indebted to him in the sum of \$70.29, upon an order from N. C. Christianson which they had accepted; also, for \$37.50 for the rent of a building, \$4 for an order which they had accepted from one McKookan, and \$6.97 for drugs sold and delivered to the plaintiffs by the defendant. On the trial of the cause the jury returned a verdict in favor of the defendant for the sum of \$16.56, upon which judgment was rendered.

W. L. Camp, one of the plaintiffs, being called as a witness, testified: "This is our book of original entries. I made most of the entries myself, and the goods were charged to Sadler. Before Compton and me went in together Sadler and me were dealing together, and I owed Sadler some, which I afterwards paid. He said he was about to make a trade with Christianson, and would bring an order from Christianson on us, and did not want the goods charged to him, but I said I would charge the goods to him, and if he brought the order from Christianson it would be all right, but he never brought an order. I think in July some time we were talking about the matter, and I told him to bring in the order, so we could settle the matter up. He said he had no order from Christianson. We were then looking over the books together. He said he had no order from Christianson, but he had a due-bill on Christianson. I said, that is a very different thing, and shut up the book. He said he wanted the balance of the goods at wholesale prices. Christianson was considered good at that time, but after he came and tried to press the matter I heard Christianson was failing. The amount due from

Sadler on the book foots up \$82.71. There is a credit on order from McCorkle. He has the same account himself."

On cross-examination he testified: "This is a book of continuous accounts, and the only book of accounts we have in connection with the business. We kept no ledger, and Sadler and Christianson were the only ones we kept any continuous accounts with. All others were just by the day. The items were put down at or about the time Sadler got the goods. Some of the goods I bought of Dr. Sadler, and some were bought in Omaha. Some time in July—I forget whether it was at the time he brought the McCorkle order or not—I told Sadler to bring the order from Christianson. The amount of the Christianson order, when he commenced trading there, was about \$50. In some way I heard the doctor say that in some trade he was to have an order for about \$50, and after that I heard he had another trade, by which he was to have another order. Compton was about the store at the time of my talk with Sadler; could not say whether he was right by us or not. I don't know that I ever heard any conversation between Compton and Christianson in regard to the delivery to Sadler of goods by our firm on account of Christianson. When Christianson sold those goods to Compton he wanted to give some order, and said this: 'Any trade that I can throw you here it will be all right, and orders I send just charge them up.' I think he said he was making a trade with Sadler. Now there were some trades like that—where there was a difference—he wanted us to pay in money, and we did one of \$15 or \$20, and charged them to Christianson. I don't know only about \$15 or \$20. Christianson said the man would want \$15 or \$20; in all, about \$25 in goods and money. Christianson said he was going north, and wanted us to attend to it. In regard to the date I would not say, for I don't know whether it was July 28th or not, but I said, 'Ask Dr. Sadler for that order for \$50 or \$75 against us,' and he

Camp & Compton v. Sadler.

said he had no order, but a due-bill of nearly \$100, and that he was going to let Turner have it. I supposed he had an order, and I wanted the order so I could change the account from Sadler to Christianson. I don't know as I said, about July 28th or August 4th, that the goods we let him have were all right, but I said for him to bring an order and let me credit it, but he never brought it. The last item in the account, I did say to Sadler, we could not charge to Christianson's account. He said I might charge it to his individual account. I don't think he asked to have it charged to Christianson's account, the same as the other goods, because we had had quite a racket about it a few days before. He commenced suit against me for this due-bill for \$100 or \$150, and had an attachment suit. I don't remember whether or not this racket was about our not paying the balance of the goods. I don't know but he demanded the balance of the goods. I told him I was not buying notes on Christianson the last of July or first of August. It is not a fact that Sadler told me and Compton, about the time of this racket, that if we did not choose to let him have the goods to the amount of Christianson's order, or the amount of the balance of the \$205, that he would go to the wholesale store of Christianson and take the balance out of that store; neither did Compton and I request him to let the matter rest, that his account would be all right, so far as I know; I never did. I was never present when Compton said so, either."

Q. Is it not a fact in July, 1883, you asked Mr. Allen to get an order from Dr. Sadler for some goods, saying that you were owing him on accounts of goods?

A. Allen came to me and asked if I would accept an order on Sadler, as he was owing him and wanted to get his pay. I refused to accept the order; that was all there was about it. In the first place he came and asked me about it, then it run along two or three weeks. In the first place I would have taken the order if he had had it, but at last I told him I would not.

On re-direct examination he testified: "I know Sadler got goods there and they were charged to him. The agreement between me and him was that he should pay for them. This is the account. Those items were delivered to him and he has never paid for them."

Dr. S. Sadler, the defendant, being called, testified: "I am the defendant. I never bought of the goods on that book from the sixth of June, not one dollar or one cent's worth, from Camp & Compton, except with the express understanding that it should be charged to N. C. Christianson, I will say with the exception of the last item of \$15. This agreement between Camp & Compton, Christianson, and myself was on various accounts. One was a land trade by Christianson or his agent, Wintz, which was for \$60. The first account I had against Christianson was some land sold to Wintz, by which Christianson was indebted to me \$60. I was to receive \$60 in goods, that were to be sent here to Camp & Compton. I asked Compton if it would be all right. He said it would be after the goods came. Afterwards we went to Camp & Compton and they said they would accept an order of that kind, and all others. This conversation was about the 5th or 7th of June, might have been before that time. The conversation when Wintz was with me was about the 6th or 10th of June. Wintz was acting as Christianson's agent through a power of attorney. On or about July 7, 1886, Camp & Compton were owing me \$482 and some cents for a stock of drugs I had sold them; as a balance due me Camp gave me an order on Gardner for \$475, which Gardner accepted. Then the balance was the amount of difference, six dollars and ninety-seven cents, on July 7, 1883, against Camp & Compton. I think Camp & Compton rented the building from me about April 15th; they had the building five months. They paid first two months' rent, the other three months' rent they refused to pay. I demanded it frequently. Compton

always said they would settle as soon as this matter here was settled. Just previous to the commencement of this suit, I made a demand, and they refused to pay it. I think the rent was to be paid monthly; there was no definite agreement. I think it was agreed they should pay monthly in advance. That was my understanding at any rate. It run from April 15th or 16th until the 15th of August; they have paid me \$25." On cross-examination he testified: "There is due me for rent \$37.50; on April 15th I have them charged with one month's rent in advance; also on May 15th, on June 15th, on July 15th, and on August 15th. I think June 15th they paid me \$25. I think they paid me from August 15th in goods and some money for rent up to the last half month, which is unpaid. They paid me all rents after August 15th except the last half month. The receipt does say from June 16th to August 16th. I remember now. When he paid the two months' rent he wanted to make the receipt for the last two months of the five months then due. He said he wanted it that way and would fix it all right. I said it was all right so far as I was concerned. I had them charged with five months' rent on a certain day. They paid me for two months' rent, or \$25."

Q. First you stated you had been paid by them from the 16th of April to the 16th of June, and your receipt shows payment from June 16th to August 16th.

A. Well, if they have receipts for the first three months that will end it. It may be possible, as I was testifying from memory and thought the payment was for the two months first due, but I remember now since you called my attention to it, that he made the receipt for the last two months. The reason why he did it I don't know. They still owe me \$37.50 on rent, I think they paid me all but a half a months' rent; they paid me two month's rent out of the first five that was due. I recollect giving him a receipt for two months' rent, but he has no receipt for the

other three months. The first rent he paid me was not a settlement of an old matter between me and Camp. I recall now the reason he gave for taking the receipt for the last two months was for the very reason that at that time, it was about the time they took charge of these goods, and though Compton was part of the firm it did not so appear at the last two months. I never authorized or told Camp & Compton to ever charge one dollar to me, and it was not charged to me as I understand it. They should have been charged to N. C. Christianson. Christianson owed me afterward, I took a due bill to settle up with him. Afterwards I think Christianson failed.

Q. Did you ever attach the property of Christianson for this very account you are trying to get in here?

A. I attached him and at the same time I think I attached Camp & Compton and Christianson.

Q. You claimed then he owed you?

A. Yes, sir.

Q. And does yet?

A. Yes, sir.

Q. Then he is the fellow you would be after, if he had anything, is he not?

Objected to as immaterial, sustained, plaintiff excepts.

A. I don't know whether or not this McCorkle order was ever paid or not.

On redirect examination he testified: "There has been none of the five months' rent paid, except \$25. The receipt dated January 9th, 1883, is a mistake in date, I just signed it as it was filled out. This July receipt, showing payment from June 16th to August 16th, was so made to accommodate Camp." He also testified that "There was nothing in particular unfriendly between us [them]."

There are other witnesses to corroborate the testimony of Camp, and also of Sadler, the testimony being nearly equally balanced. It will thus be seen that there is a

Camp & Compton v. Sadler.

direct conflict in the evidence as to the three months' rent for the building, and also in regard to the person to whom the credit was given for the goods purchased by Sadler. The question, therefore, was one proper to submit to the jury, and from the nature of the testimony it is impossible for this court to say that the verdict is wrong.

The plaintiffs asked the court to instruct the jury as follows: "The court further instructs you that if you find that at the time of the commencement of this action there was a valid and subsisting indebtedness existing in favor of Samuel Sadler and against N. C. Christianson, and that said N. C. Christianson gave orders on Camp & Compton to Samuel Sadler, although you may find that said orders were orally accepted by Camp & Compton, yet you will find for the plaintiffs." This instruction was refused, to which the plaintiffs excepted and now assign the failure to give the same as error.

If Christianson gave orders in favor of Sadler on Camp & Compton, which they accepted and paid by the sale of goods to Sadler, there would be no liability on the part of Sadler to pay for such goods unless he was liable as principal debtor or guarantor. In other words, if a party upon whom an order is drawn accepts the same and thereupon proceeds to pay the amount of the order to the person in whose favor it is drawn, the presumption is that the credit was given to the drawer of the order, unless the holder by some acts of his own renders himself liable, of which there is no proof in this case.

There is no material error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JOSEPH H. MILES, APPELLANT, v. F. X. STEHLE,
APPELLEE.

Mortgage Foreclosure: STRICT FORECLOSURE. In an ordinary action to foreclose a mortgage a decree of foreclosure and sale should be rendered, yet where a purchaser in good faith under a decree of foreclosure of a senior mortgage files a bill to require a junior incumbrancer, not a party to the action, to foreclose, to redeem, within a day to be named, or be barred of the right, and it does not appear that the premises if sold would satisfy the liens prior to that of the junior incumbrance, a decree of strict foreclosure may be rendered requiring such junior incumbrance to redeem the prior incumbrances within a reasonable time, to be named in the decree, or be barred of the right of redemption.

APPEAL from the district court of Richardson county.
Heard below before BROADY, J.

C. Gillespie and John Gagnon, for appellant, cited: *Renard v. Brown*, 7 Neb., 449. *Miller v. Finn*, 1 Id., 301. *Jefferson v. Coleman*, 9 Western Reporter, 74. *Bresnahan v. Bresnahan*, 46 Wis., 385.

No appearance for appellee.

MAXWELL, CH. J.

This is an action brought by a purchaser of real estate to require certain junior incumbrancers to redeem or be barred of their right. The plaintiff alleges in his petition, "that on the 20th day of March, 1885, one Alexander St. Louis obtained a decree of foreclosure and sale in the district court of Richardson county of the following described premises, viz.: The south half of lot six, in block six, in Rulo proper, in Richardson county, Nebraska, in an action pending in said court, wherein the said Alexander St. Louis was plaintiff, and Martha A. Caversagie and Charles Cav-

Miles v. Stehle.

ersagie were defendants; afterwards said premises were sold under said decree, and this plaintiff became the purchaser thereof for the sum of \$425, which was duly paid; and thereafter said sale was duly reported to said court and in all things confirmed, and a deed in due form was, on or about the 20th day of May, 1886, made by the sheriff of said county to the plaintiff, who thereupon entered into possession of said premises and still retains possession of the same; that on or about the 24th day of July, 1884, the said Martha A. Caversagie and Charles Caversagie executed a mortgage upon the above described premises to the plaintiff, for the sum of \$200, payable in one year after date with ten per cent interest per annum from date, which mortgage was subsequent to the mortgage of the said Alexander St. Louis, under which plaintiff claims title by virtue of the sheriff's sale hereinbefore mentioned. There is now due the plaintiff, upon the note which said second mortgage was given to secure, the said sum of \$200 and the interest thereon since the 24th day of July, 1884, at the rate of ten per cent per annum.

"The defendant, F. X. Stehle, claims to be the owner of a third mortgage upon said premises, executed by the said Martha A. Caversagie and Charles Caversagie subsequently to the mortgage of the said Alexander St. Louis, under which plaintiff claims title as above set forth, and also subsequently to the mortgage of the said plaintiff above described, upon which mortgage of defendant he claims there is due the sum of \$167.30, and interest since the 13th day of September, 1884, at the rate of ten per cent per annum, which mortgage is now past due and payable. Plaintiff alleges that neither the defendant nor himself were made parties to the suit to foreclose the senior mortgage on said premises by the said Alexander St. Louis, under which the plaintiff claims title. On the 21st day of May, 1886, the plaintiff requested the defendant to pay him the amount of said purchase money paid by plaintiff

for said premises at the sale in foreclosure above set forth, and also the amount due plaintiff on his mortgage, but said defendant refused and still refuses to comply with any part of the plaintiff's request. The plaintiff therefore prays that an account may be taken of the amount due plaintiff for said purchase money of said premises, and also for the amount due upon the mortgage of the plaintiff therein, and that the said defendant be required to pay plaintiff the amount so found due by a day to be appointed by the court for that purpose, or in default thereof that said defendant and all persons claiming under him be forever foreclosed and debarred of all right and equity of redemption in and to said mortgaged premises, and for such other relief as may be just and equitable."

It will be observed from the allegations of the petition that the plaintiff is the purchaser under the St. Louis mortgage, and also that he holds a mortgage for \$200 upon said premises, executed after the St. Louis mortgage, and that he was not a party to the action to foreclose the first mortgage. The action, therefore, is directed against the defendant Stehle, as the owner of the third mortgage for \$167.30. No answer was filed to the petition, and a decree was rendered by default, the court ordering a sale of the premises and the payment of the liens in the order of their priority. In this we think the court erred. Ordinarily a decree of foreclosure and sale is the proper procedure; and where it is apparent that the mortgaged premises, if sold under the decree, will satisfy all the liens against such property, a sale of the premises is a proper remedy. And in this state a mortgage being a mere chattel interest, the mortgagee in possession can not acquire the title by proceedings in strict foreclosure. Where, however, property has been sold under a senior incumbrance, and the sale has been confirmed and the deed made to the purchaser, who thereby acquires the estate of the mortgagor and also of the incumbrancer at whose instance the sale

was made, such purchaser may maintain an action of strict foreclosure, in a proper case, against a junior incumbrancer, where it is apparent that the premises if sold would be insufficient to satisfy the liens having precedence of such junior incumbrance. That is, a court will not order a sale and subject the parties to a needless expense, when such sale would be unavailing. Therefore, in such cases the court will give the junior incumbrancer the right to redeem the prior incumbrances, and thus protect his own lien. Pomeroy Eq. Jur., Sec. 1227n. 2 Jones on Mortgages, Sec. 1540, and cases cited.

In such cases the junior incumbrancer must exercise the right within the time limited, or be barred thereof. In the case at bar the defendant did not answer or offer to redeem. Nor does it appear that the premises if sold would bring sufficient to satisfy the claims of the first and second mortgages.

The decree of foreclosure and sale, therefore, was erroneous, and is reversed, and the cause will be remanded to the district court of Richardson county with directions to enter a decree finding the amount due the plaintiff on both mortgages, the costs and taxes paid by him, and require the defendant to pay the same within six months from that date or be barred of the right.

JUDGMENT ACCORDINGLY.

THE other judges concur.

28	744
29	750
22	744
58	18

H. ROSENBAUM & Co., PLAINTIFFS IN ERROR, V. WILLIAM H. HAYDEN & Co., DEFENDANTS IN ERROR.

1. **Summons: PARTNERSHIP: SERVICE BY PUBLICATION.** In an action against a firm by its firm name the summons may be served by a copy left at its usual place of doing business within the county, with one of the members, or with the clerk or general agent thereof. And where an action is properly brought, but personal service cannot be had upon any of the above named persons, it may be made by publication.
2. **Partnership.** A partnership is a distinct entity, having its own property, debts, and credits. For the purpose for which it was created it is a person, and as such is recognized by the law.
3. —: **ATTACHMENT: JURISDICTION.** H. & Co. were doing business in Red Willow county, and an action was brought against such firm in that county, and an attachment issued and levied upon certain firm property. Service was had by publication, and on the day set for hearing the defendant appeared and objected to the jurisdiction of the court, for the reason that the firm consisted of W. H. H. and no other person, and that since the commencement of the action he had been a resident of Adams county. *Held*, That as he had contracted the debts in a firm name and thereby received the benefit to be derived from a partnership name, he could not thereby divest himself of the burdens incident thereto, one of which was the right to bring an action in the county in which the alleged firm was doing business. *Held*, Also, that having received credit as a firm, he was as to creditors estopped to deny that relation.

ERROR to the district court for Red Willow county.
 Heard below before GASLIN, J.

J. Byron Jennings, for plaintiffs in error, cited: Code, Sec. 932. *Paine v. Moreland*, 15 Ohio, 444. *Taylor v. Carney*, 4 Kan., 548. *Cooper v. Reynolds*, 10 Wall., 308.

Capps & McCreary, for defendants in error.

MAXWELL, CH. J.

This action was commenced before a justice of the peace in Red Willow county by the plaintiffs against the defendants. The docket entries are as follows :

" *June 7th, 1886.* Plaintiff filed his bill of particulars, wherein he claims of the defendant the sum of \$200 upon an account.

" *June 7th, 1886.* Plaintiff filed the following affidavit for attachment :

" "Before S. H. Colvin, a justice of the peace in and for said Red Willow county, Nebraska.

" "H. Rosenbaum & Co.)	The State of Nebraska,
v.)	Red Willow County.
Wm. H. Hayden & Co.)	

" "R. S. Beck, agent of the plaintiffs, being first duly sworn, deposes and says that they have commenced an action before S. H. Colvin, a justice of the peace, against Wm. H. Hayden & Co., to recover the sum of \$200, now due and payable, from the defendant. Affiant says that said claim is just, and they ought as he believes to recover thereon the sum of \$200, and that the defendant, Wm. H. Hayden & Co., so conceal themselves that a summons cannot be served upon them, and are about to convert their property, or a part thereof, into money, for the purpose of placing it beyond the reach of their creditors, and have property which they conceal.

" "R. S. BECK.

" "Subscribed in my presence and sworn to before me this 7th day of June, 1886.

" "S. H. COLVIN,

" "*Justice of the Peace.*"

The plaintiffs filed an undertaking, which was duly approved. Certain property of the defendant was attached, which was appraised at more than \$200, and an agent of the defendant executed an undertaking to abide the judg-

ment of the court, and thereupon the property was released. The return on the summons is as follows :

"Received this writ June 7th, 1886; as commanded by this writ, I, on the 7th day of June, 1886, summoned the within named W. H. Hayden & Co., by leaving at their usual place of doing business, in Red Willow county, Neb., with Charles Noble, the clerk and general agent of the defendants, a certified copy of this writ and the endorsement thereon.

Dated this 11th day of June, 1886.

Fees :

Service and return... 50

Copy 25

JOHN W. WELBORN,
Sheriff.

75 . By J. H. BENNETT,
Deputy."

At the return day of the summons the defendant filed the following :

"The defendant specially appearing, solely and only for that purpose and for none other, objects to the jurisdiction of the court, for the reason that no service of summons has been had upon defendant."

This motion was supported by the following affidavit:

"STATE OF NEBRASKA, }
Red Willow County. }

"Charles Noble, being first duly sworn, deposes and says that he now is and has been for a long time since, a resident of McCook, Nebraska; that on the 7th day of June, 1886, a copy of what purported to be a summons to Wm. H. Hayden & Co., from the justice court of S. H. Colvin, of Red Willow county, Nebraska, to answer the action of H. Rosenbaum & Co., was presented to this affiant by the deputy sheriff of said county; that at the time of the service of summons on this affiant he was not in the employment of Wm. H. Hayden & Co., or Wm. H. Hayden, in any capacity whatever, at any time since the

commencement of this suit of *H. Rosenbaum & Co. v. Wm. H. Hayden & Co.*; that he was not the agent, and was not in the employment of any of the defendants in any capacity whatever, or any way connected with said Hayden or company, at the time of commencing the above stated action, or at any time since, and this affiant says that said copy of said summons was handed to him in the store-room lately occupied by the said Hayden & Co., in McCook, Nebraska; that said store-room was not at the time of the commencement of this suit, is not now, and never has been the usual place of residence of the said Wm. H. Hayden, or any of the defendants in the above entitled cause, and this affiant further says that he never had any interest of any kind, or value whatever, in the business of Wm. H. Hayden & Co., and further this affiant saith not.

“CHARLES NOBLE.

“Subscribed and sworn to before me this the 12th day of June, 1886.

“S. H. COLVIN,
“*Justice of the Peace.*”

The justice sustained the objections, and thereupon the cause was continued for service. In this we think the court erred.

Section 25 of the code provides that, “Process against any such company or firm shall be served by a copy left at their usual place of doing business within the county, with one of the members of such company or firm, or with the clerk or general agent thereof, and executions issued on any judgments rendered in such proceedings shall be levied only on partnership property.”

It will be observed that Noble swears that the summons was served upon him at the place of business of Wm. H. Hayden and Co., but he alleges that at the commencement of the suit he was not in the employment of that firm. He fails to state dates when his connection with the firm ceased. He swears to a mere conclusion, as there might be a differ-

ence of opinion as to the date the suit was commenced, notwithstanding the plain provision of the statute, nor does he swear that he was not left in charge of the store. No error is assigned upon this ground, however, and the matter need not be further considered.

The cause being continued for service, the plaintiff proceeded to obtain service by publication. At the time set for the hearing in the publication notice the defendant appeared specially and objected to the jurisdiction of the court, for the reason that the defendant at the commencement of the action and then was a resident of Adams county, as follows :

"The defendant appearing specially, for that purpose and for none other whatever, suggests to the court want of jurisdiction over the person of the defendant, and over the subject-matter of this suit, for the reason that said defendant at the time of the commencement of this suit was and ever since has been a resident of Hastings, Adams county, Nebraska, and subject to service in said county, and no personal service has ever been had in this cause."

The justice overruled the motion, and the defendant failing further to appear, judgment was rendered in favor of the plaintiff for the sum of \$200. The cause was then taken on error to the district court, where the judgment of the justice was reversed and the cause dismissed. The plaintiffs now prosecute error in this court.

It will be observed that the action is brought against W. H. Hayden & Co., a purported firm doing business in Red Willow county. In such case section 25 of the code authorizes service to be made upon the firm at the usual place of doing business within the county. In such case a party is not compelled to go to the residence of the partners, but proceed at one against the artificial persons—the firm. The reason, as given in *Roop v. Herron*, 15 Neb., 80, is, "a partnership is a distinct entity, having its own property, debts, and credits. For the purposes for which it was

created it is a person, and as such is recognized by the law. And the credit being given to the firm—in effect to the partners jointly, it would seem but justice that the goods so purchased should not be diverted to the use of an individual partner, when such diversions will have the effect to defraud the creditors of the firm.”

Acting upon this rule, this court has uniformly held that in case of the insolvency of the firm, partnership debts were to be paid out of the joint fund before any portion of such fund could be applied to other purposes. *Bowen v. Billings*, 13 Neb., 439. *Roop v. Herron*, 15 Neb., 73. And such is the rule stated by Chancellor Kent. 3 Kent's Com., 64. And this principle is recognized in cases where an execution for the separate debts of one of the partners is levied upon the partnership property. In such case the levy is restricted to the interest of the judgment debtor therein, after the adjustment of the partnership debts. *Nixon v. Nash*, 12 O. S., 647. *Hankey v. Garratt*, 1 Ves., 239. *Barker v. Goodair*, 11 Id., 85. *Muir v. Leitch*, 7 Barb., 341. *Deal v. Bogue*, 20 Penn. State, 228. Story's Eq. Juris., Sec. 677, and cases cited. Partnership property, likewise, is not subject to the exemption laws. *Till's Case*, 3 Neb., 261. *Wise v. Fry*, 7 Neb., 134. The firm, therefore, for the purposes of being sued, was a resident of Red Willow county. Credit was given to it in that county under the supposition that it was doing business there. Hayden's affidavit, “that he was the sole owner and proprietor of the business conducted at McCook, Nebraska, under the name of Hayden & Co.” and “that he now is living at his home in Hastings, Nebraska, fully accessible to any or all process from the courts of this state, and has never at any time attempted to avoid the service of summons issued from this or any other court,” is found in record. By this he admits that he was doing business in a partnership name, thereby receiving all the benefits to be derived from it. He does not claim that it was generally

known that he was sole partner, and the name in fact fictitious, but he held himself out to the world as a firm doing business at a certain point, and received credit there as a firm, and as against a creditor who trusted him on the strength of his being a firm he will not be permitted to deny that fact to the prejudice of such creditor. He must take the burden with the benefit. Had he done business in the name of W. H. Hayden, at McCook, and at the same time been a resident of Adams county, creditors would have known that in order to bring an action against him they must proceed in the county of his residence, or where service could be had upon him. But having done business in a firm name, his property, as to creditors of such firm and as to the rights and remedies against it, will be in all respects the same as if the firm of W. H. Hayden & Co. was composed of two or more partners.

This being so, the judgment of the district court is reversed, and that of the justice reinstated, and the cause is remanded to the district court with directions to enforce the undertaking of the defendant to perform the judgment of the court.

JUDGMENT ACCORDINGLY.

THE other judges concur.

J. H. LEE & Co., PLAINTIFFS IN ERROR, v. W. H. HAYDEN & Co., DEFENDANTS IN ERROR.

MAXWELL, CH. J.

The facts in this case are identical with those in *Rosenbaum & Co. v. W. H. Hayden & Co.*, ante p. 744, and the same judgment will be entered.

JUDGMENT ACCORDINGLY.

THE other judges concur.

UNION PACIFIC RAILWAY COMPANY, PLAINTIFF IN
ERROR, V. JAMES SMERSH, DEFENDANT IN ERROR.

39	751
94	452
39	751
95	657

1. **Garnishment.** While an order made by a court in a proceeding in garnishment after judgment cannot be attacked collaterally, yet the garnishee afterwards may set up facts showing the amount owing by such garnishee to the debtor to be exempt from attachment or execution.
2. ——— : **AFTER JUDGMENT.** While the statute in proceedings in garnishment after judgment does not require notice to be given to the judgment debtor, yet the courts have power to require such notice to be given before the garnishee files his answer, in order that the debtor may protect his rights, and if the money or property is exempt, have an opportunity to plead the exemption.
3. **Exemption: LABORER'S WAGES.** Money which is absolutely exempt, such as the wages of laborers who are heads of families, for sixty days, is not subject to fraudulent alienation, and the fact that such wages are exempt is a complete defense to any proceeding to apply them to the payment of a judgment against the debtor.

ERROR to the district court for Douglas county. Tried below before WAKELEY, J.

A. J. Poppleton and *J. S. Shropshire*, for plaintiff in error, cited: *Schlueter v. Raymond Bros.*, 7 Neb., 281. *Tingley v. Dolby*, 13 Id., 371. *Wilson v. Burney*, 8 Id., 39.

D. Van Etten, for defendant in error.

MAXWELL, CH. J.

The defendant in error brought an action against one L. H. Webster, before a justice of the peace in Douglas county, and recovered a judgment for the sum of \$45.83 and costs. Execution was duly issued on said judgment, and returned wholly unsatisfied. Afterwards an affidavit was filed before the justice alleging that the Union Pacific

Railway Company was indebted to Webster, and thereupon a summons in garnishment was issued and served on said company. The proceedings in garnishment are set forth in the transcript as follows:

"April 9, 1884, J. S. Shropshire, for garnishee, appeared and filed affidavit that garnishees were indebted to defendant in the sum of \$53.90. Whereupon, the garnishee was ordered to pay the same into this court.

"June 3, 1884. Amended answer of garnishee filed.

"June 3, 1884. Affidavit of defendant filed.

"June 10, 1884. Motion filed to discharge garnishee.

"STATE OF NEBRASKA, }
Douglas county. }

"The Union Pacific Railway Co., garnishee, by J. S. Shropshire, who, being duly authorized to answer herein, files this its amended and supplemental answer in the above entitled case, and says that the answer heretofore filed by the garnishee herein was by oversight and mistake incomplete in this, to-wit: That at the time said answer was filed the said garnishee was not in fact indebted to said defendant, as affiant is informed and believes, for the reason that on the 17th day of March, 1884, the defendant sold and assigned to one Charles Brandes, of Omaha, the money sought to be garnished herein, and that said garnishee had notice of said assignment, but by accident and mistake this affiant was not notified of said fact in time to set the same up in the answer of the garnishee, filed as aforesaid. Affiant says that the said money answered as due said defendant was paid to the said assignee, who claimed and demanded the same.

"Affiant further says if the said money had not been assigned as aforesaid, but on the other hand was due and payable to said defendant, it would have been exempt to said defendant under the laws of this state; that said defendant is a married man and the head of a family, consisting of a wife and children, whom he supports and with

whom he resides in Douglas county, and that the said money was earned by him as laborer's wages, all within sixty days immediately preceding the date of the answer aforesaid. Affiant says that said plaintiff and this court have had notice since the answer was filed herein that said money was exempt to said defendant, for the reason above set forth; but affiant believes that the said defendant up to this time has had no notice of the pending of said garnishment, and has had no opportunity to file his exemption.

"Wherefore garnishee asks to be discharged."

"STATE OF NEBRASKA, }
Douglas county. }

"L. H. Webster, being duly sworn, deposes and says that he is the defendant above named, that he is a *bona fide* resident of Douglas county, Nebraska, and has been for eighteen years last past; that he is a married man and the head of a family, with whom he resides in said Douglas county, and whom he supports; that the money sought to be garnished in this action, in the hands of the Union Pacific Ry. Co., was earned by him during the month of March, 1884, as a laborer; that prior to the service of the garnishment herein, to secure an indebtedness due to Charles Brandes, of Omaha, he assigned to said Brandes the money garnished in this action; that if the said money had not been assigned as aforesaid, it would have been exempt to him under the laws of this state, by reason of its being laborer's wages for less than sixty days, and he being the head of a family aforesaid. Affiant says that he only this day received notice of said garnishment, and was not aware that the court had made any order in respect to his earnings. Affiant further says that said plaintiff is well acquainted with this defendant, and well knows that the defendant is a resident of Douglas county, and that he is the head of a family, and that by reason thereof the said money is exempt to him under the laws of this state; but

that the said plaintiff is taking this course for the purpose of maliciously prosecuting and annoying this defendant.

"Wherefore defendant asks that the garnishee herein may be discharged, and the order on the garnishee to pay said money into court be revoked and set aside."

Section 531a of the code provides that, "The wages of laborers, mechanics, and clerks who are heads of families, in the hands of those by whom such laborers, mechanics, or clerks may be employed, both before and after such wages shall be due, shall be exempt from the operation of attachment, execution, and garnishee process; *Provided*, That not more than sixty days' wages shall be exempt; *Provided further*, That nothing in this act shall be so construed as to protect the wages of persons who have or are about to abscond or leave the state from the provisions of law now in force upon that subject; *Provided further*, That nothing in this act shall be so construed as to permit the attachment of sixty days' wages in the hands of the employer."

In *Wright v. C. B. & Q. R. R. Co.*, 19 Neb., 175, the court, in construing this statute, held that, "The wages for sixty days' services of laborers, mechanics, or clerks, who are heads of families, in the hands of those by whom such laborers, mechanics, or clerks may be employed, are exempt from execution, attachment, or garnishment, whether the employe is a resident of the state or not. Such wages are absolutely exempt." See also *Turner v. S. C. & P. R. R.*, 19 Neb., 241.

In *Albrecht v. Treitschke*, 17 Neb., 205, it is held that where a creditor obtained by garnishee process the exempt wages due a laborer, and applied the same to a judgment in his favor, a cause of action thereby arose in favor of the debtor against the creditor, unless the exemption was waived. It is said, p. 207, "It is well settled that if exempt property is seized and applied to the payment of a judgment the owner may have his action against the

U. P. Ry. Co. v. Smerah.

wrong-doer, unless such exemption is waived by some act or omission of the debtor. *Haswell v. Parsons*, 15 Cal., 266. The wrong-doer in this case was the defendant. He has procured property to be applied to the payment of his judgment to which he was not entitled. He must refund it. *Phillips v. Hunter*, 2 H. Bla., 402."

In *Wilson v. Burney*, 8 Neb., 39, it was held that an order against a garnishee after judgment could not be collaterally attacked. See also *Clark v. Foxworthy*, 14 Neb., 241; and *B. & M. R. R. Co. v. Chicago Lumber Co.*, 18 Neb., 303. While the order is so far final that the garnishee cannot dispute it, yet if the proper proceedings are had before the payment of the money to the creditor to show that the money was absolutely exempt, it would be the duty of the court to withhold the money and refuse to apply it in satisfaction of the debt. There is nothing in this record to show that the railway company, at the time it answered had notice that Webster was the head of a family, and that therefore his wages for sixty days were exempt. But it does appear that Webster had no notice of the garnishment proceedings until a day or two before the motion to discharge the garnishee was filed. If the money in the hands of the U. P. R. R. Co., or in the hands of the justice, was exempt from levy, either by attachment or execution, and not liable to be applied to the payment of Webster's debts, he should be permitted to show that fact at any time before the payment of the money to such creditor. While the statute does not require notice to be given to the judgment debtor in cases of garnishment after judgment, yet it is obvious that such notice should be required in every case, and courts have undoubted authority to require such notice to be given. Otherwise it would be possible for a garnishee to answer, pay the amount owing by him to the debtor into court, and the court apply the same to the payment of the debt without the judgment debtor having any notice whatever. We hold, therefore, that the

Smith v. Mesarvey.

judgment debtor, and also the garnishee, had a right to bring to the attention of the court facts showing that the money in question was not subject to the payment of the judgment in question, and that if paid could have been recovered in a proper action. The money being exempt was not susceptible of fraudulent alienation, and the debtor could make such disposition of it as he saw fit and plead the exemption, which if proved is a complete defense.

It follows that the judgment of the district court must be reversed and the cause remanded.

REVERSED AND REMANDED.

THE other judges concur.

HIRAM L. SMITH, APPELLEE, v. GEORGE W. MESARVEY
AND OTHERS, APPELLANTS.

1. **Deed: DELIVERY.** Where the evidence as to the delivery of a deed is conflicting and nearly equally balanced, and the court below found in favor of delivery, such finding will not be set aside as being against the weight of evidence.
2. ——— : **BOND FOR DEED: VENDOR'S LIEN: PRIORITY OF LIENS.** Where a vendor had executed a bond for a deed, two-thirds of the purchase money being still unpaid, and afterwards delivered a deed to an attorney upon his assurance that if the deed was delivered to the grantee, he would either pay or secure the purchase price to said vendor, *Held*, That as the vendor, prior to the delivery of the deed, had a lien upon the premises for the unpaid purchase money, which lien was divested by the absolute delivery of the deed by the attorney to the grantee, that therefore the equity of the vendor was superior to that of the attorney for services rendered the grantee, and a mortgage taken by such attorney to secure his fees would be postponed to the claim of the vendor for the unpaid purchase money.

Smith v. Mesarvey.

APPEAL from the district court of Fillmore county.
Heard below before MORRIS, J.

Robert Ryan, for appellants, cited: *Tiedeman on Real Property*, Sec. 812. *Cook v. Brown*, 34 New Hamp., 460. *Wheelwright v. Wheelwright*, 2 Mass., 452. *Clark v. Gifford*, 10 Wend., 313. *Barlow v. Hinton*, 1 A. K. Marsh, 97. *Newlin v. Beard*, 6 W. Va., 110. *Rhodes v. School District*, 30 Maine, 110.

J. W. Eller, for appellees Schribars and himself.

J. Jensen, for appellee Smith.

MAXWELL, CH. J.

In October, 1886, appellee Smith filed his petition, praying a foreclosure of a mortgage held by him to secure a note for \$400, dated October 24, 1876, due October 24, 1881, payable to the New England Mortgage Security Co., or order, and by the payee assigned to said Smith. The mortgage securing this note was made of the same date as the note by Geo. W. Mesarvey and Elizabeth Mesarvey, his wife, upon the W. $\frac{1}{2}$ of the N.E. $\frac{1}{4}$ of Sec. 34, Tp. 7 N., range 3 W. 6 P. M., lying and being in Fillmore county, Nebraska. A decree was rendered in June, 1887, for \$690.52 on the mortgage, and for \$33.15 for taxes, being the amount of the note and taxes advanced. This decree is admitted to be correct so far as the plaintiff is concerned, and the only question that arises is between the defendants, as follows:

In March, 1881, Mesarvey and wife being in possession of the premises in question as a homestead, sold the same to John Schribar and wife, and executed and delivered to them the following obligation:

"Know all men by these presents: That I, George W. Mesarvey, and Elizabeth Mesarvey, his wife, are held and

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firmly bound unto John Schribar and Katharine Schribar, his wife, in the penal sum of three hundred dollars, for the payment of which we bind ourselves firmly by these presents, upon condition as follows: Whereas George W. Mesarvey and Elizabeth Mesarvey, his wife, have agreed to sell and convey unto the said John Schribar and Katharine Schribar, his wife, for the consideration of three hundred dollars, the following described premises, to-wit: The west half of the N.E. quarter of section 34 in town 7, range 3 west, containing eighty acres.

"And I, John Schribar, and Katharine Schribar, his wife, have agreed to purchase said premises and to make payments as follows: One hundred dollars in hand, and two hundred dollars to be paid on the first day of October, 1881.

"Wherefore, the condition of this obligation is such that if the above bounden George W. Mesarvey and Elizabeth Mesarvey, his wife, will convey said premises by deed subject to all mortgages and liens, unto said John Schribar and Katharine Schribar, his wife, upon the payment of of said consideration at the times above stipulated, then this obligation to be void, otherwise to be and remain in full force and effect.

"Witness our signature hereunto subscribed this 29th day of March, A.D. 1881.

"GEORGE W. MESARVEY,

"ELIZABETH MESARVEY."

Schribar and wife executed a promissory note for the sum of \$200, due in October, 1881, for the unpaid purchase money. This note was not paid when it became due and has not yet been paid. In July, 1882, Mesarvey and wife executed a deed to Schribar to enable him to borrow sufficient money on the land to pay the note. Schribar was unable to effect a loan, and at Mesarvey's request returned the deed to him. About that time Platt & Co. levied an execution upon the land in question, and purchased the

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same under the execution, and had the sale confirmed and a deed made. This sale was set aside and vacated by the supreme court, 19 Neb., 625, upon the sole ground that the premises being the homestead of Mesarvey and wife, and not liable to the satisfaction of the debt of Platt & Co., that therefore Mesarvey and wife could sell and convey the same and were entitled to the consideration therefor. After the making of the deed to Platt & Co., they took possession of the land as owners thereof, and retained possession until some time in the year 1886, when Schribar again obtained, and now has possession.

On the 11th of August, 1883, Eller and the Schribars entered into a contract as follows:

“FAIRMONT, NEBRASKA, August 11th, 1883.

“Whereas, John Schribar has this day made and delivered to J. W. Eller his two notes, one for \$500, due one year after date, and one for \$300, due fifteen months after date.

“The consideration of said notes is as follows: That said John Schribar claims to be the owner of the west one-half of the north-east quarter of section 34, township 7, range 3, by virtue of a bond for a deed and a deed from George W. Mesarvey and his wife. And J. T. Platt & Co. claim to own said land by virtue of a sheriff's deed, made under an execution issued out of the district court of Fillmore county, Nebraska, on a judgment in favor of J. T. Platt & Co.

“And said John Schribar and his wife have employed J. W. Eller as attorney to commence the necessary proceedings to establish their rights, in accordance with the advice of said J. W. Eller, attorney, and in case they do so and fail to establish their right against said sheriff's deed, then and in that case they shall be under no obligation to pay said notes. The consideration of the \$500 is for attorney's fees of the said J. W. Eller in the matter aforesaid, and the consideration of the \$300 note is to

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secure the said J. W. Eller in this, that said J. W. Eller has agreed to see that George W. Mesarvey shall be paid his note which he has against Schribar and his wife, in case said Schribar gets his land, and the money to be paid on the \$300 is to go from said J. W. Eller to said Mesarvey, or so much as may be necessary to pay his note against Schribar, which was given at the time the bond for a deed to said land was executed, said note being for \$200 and interest. In case a compromise should be made the notes shall hold good. This 11th day of August, 1883.

"JOHN SCHRIBAR.

"CATHARINE SCHRIBAR.

"J. W. ELLER."

Mortgages were executed to Eller in accordance with this agreement, and they are now sought to be foreclosed in this action. On the 12th day of July preceding the agreement set out, Eller obtained from Mesarvey the deed for the land in controversy executed by said Mesarvey to Schribar in 1882. There is a direct conflict in the testimony as to the character of this delivery, Eller testifying that the delivery was absolute, while Mesarvey and wife testify it was to be merely conditional upon his remitting the balance due upon the land. Eller is corroborated to some extent by an admission made by Mesarvey to one Easterday, but the most that can be said is that the evidence is nearly equally balanced, and as the court below found that there was an absolute delivery, that finding will be sustained. There is one point, however, upon which there is no dispute in the testimony, and that is, that in case of the delivery of the deed to the Schribars, Eller was to pay or secure the amount of the promissory note to Mesarvey, heretofore referred to. There is not a particle of testimony tending to show that this security was to be subject to a claim for his services, yet in the arrangement which he made with Schribar, to which Mesarvey was not a party, he (Eller) stipulated that his own claim should be

secured before that of Mesarvey. This cannot be permitted. While the legal title remained in Mesarvey he had a vendor's lien upon the land for the unpaid purchase price, and as between Eller and the Mesarveys the court will enforce such lien. The decree of the district court, therefore, will be modified so as to give Mesarvey, or the lawful assignee of his note for \$200, a lien prior to that of Eller on the premises in question for said sum of \$200 and interest thereon, and as thus modified the decree will be affirmed. Loughrey claims to have purchased the premises from Mesarvey and has obtained a deed therefor, but there appear to be no equities between them requiring adjustment in this court.

DECREE ACCORDINGLY.

THE other judges concur.

REUBEN BOLLMAN, PLAINTIFF IN ERROR, V. H. A
PASEWALK AND OTHERS, DEFENDANTS IN ERROR.

1. **Principal and Surety: ACTION ON BOND: WAIVER.** Where in an action on an indemnifying bond signed by three sureties, but not by the principal, the petition alleged "That said indemnity bond was executed and delivered by the said defendants for the purpose of saving harmless the said plaintiff in the levy and sale of the property aforesaid, and was delivered to the plaintiff by the Norwegian Plow Company, with the consent of the said defendants for that purpose," *Held*, If the allegations of the petition were true that the sureties had waived the signing of the bond by the principal.
2. ———: **BOND NOT SIGNED BY PRINCIPAL.** Where an indemnifying bond signed by three sureties was voluntarily given to an officer, conditioned that "if the above bounden Norwegian Plow Company shall well and truly save harmless and indemnify the said W. L. Rothwell, and any and all persons assisting him in

22	761
42	830
29	761
47	499

the premises, from all harm, trouble, damage, costs, suits, actions, judgments, and executions that shall or may at any time arise, come, or be brought against him, them, or any of them, then this obligation to be void," which bond was not signed by the principal, the officer having sold the goods and applied the proceeds on the executions, and afterwards judgment was recovered against him for the value of the goods. *Held*, That the obligors signing the bond were liable thereon.

ERBOS to the district court for Madison county. Tried below before CRAWFORD, J.

D. A. Holmes and A. J. Durland for plaintiff in error, cited: *Hall v. Parker*, 39 Mich., 287. *Greene v. Kindy*, 43 Mich., 282. *Harris v. Simpson*, 14 Am. Dec., 105, note. 5 *Wait's Actions and Defenses*, 191. *U. S. v. Linn*, 15 Peters, 290.

Brome, White & Maper, for defendants in error, cited: *Bean v. Parker*, 17 Mass., 591. *Bunn v. Jetmore*, 70 Mo., 228. *Wood v. Washburn*, 2 Pick., 24. *Russell v. Annable*, 109 Mass., 72.

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This is an action upon an indemnifying bond which the defendants signed as sureties for the Norwegian Plow Co. On the trial of the cause the attorney for the defendants objected to the introduction of any evidence, upon the ground that the facts stated in the petition were not sufficient to authorize a recovery. The motion was sustained, and the plaintiff not desiring to amend his petition, the action was dismissed. The following is a copy of the petition, omitting the title:

"The plaintiff complains of the said defendants and for cause of action alleges:

"1st. That on the 29th day of February, 1884, the plaintiff was the sheriff of Knox county in the state of

Nebraska, duly elected, qualified, and acting as such; that W. L. Rothwell was at said time a deputy sheriff of said county, duly appointed by the plaintiff.

"2d. That on that day the Norwegian Plow Company caused an execution to be issued out of the justice's court of said county of Knox, upon a judgment before that time recovered by said Norwegian Plow Company in said court, against one Fred. Fischer, which execution was delivered to plaintiff, who then and at the return thereof was sheriff as aforesaid; that plaintiff as such officer, by his said deputy, W. L. Rothwell, at the request of the said Norwegian Plow Company, levied said execution upon certain personal property as the goods and chattels of said Fred. Fischer, but which goods were afterwards claimed by one Deere, Wells & Company.

"3d. That said Norwegian Plow Company, in consideration of and upon the promise of plaintiff to sell said goods, executed and delivered to the said deputy sheriff for the plaintiff an obligation in writing, of which the following is a copy:

"Know all men by these presents: That Norwegian Plow Company, of Dubuque, Iowa, as principal, and H. A. Pasewalk, J. S. McClary, and A. P. Pilger, as sureties, of the town of Norfolk, county of Madison, and state of Nebraska, are held and firmly bound unto W. L. Rothwell, deputy sheriff of Knox county, in the sum of four thousand (\$4,000) dollars good and lawful money of the United States, to be paid to the said W. L. Rothwell, deputy sheriff as aforesaid, his executors, administrators, and assigns, for which payment well and truly to be made we do hereby bind ourselves, our heirs, executors, and administrators jointly and severally, firmly by these presents.

"Dated this 29th day of February, 1884.

"WHEREAS, The above bounden Norwegian Plow Company did, on February 29th, cause executions on certain judgments in its favor, and the favor of J. H.

Thomas, to issue against one Fred. Fischer, of Creighton, and placed the same in the hands of W. L. Rothwell, deputy sheriff of Knox county, for service, and whereas, the property of said Fischer has been assigned and is claimed by Deere, Wells & Co. and others, now if the said W. L. Rothwell by virtue of said executions shall levy on said property and hold and sell the same to satisfy said executions, unless the said property shall be taken from him by due process of law. Now the condition of the above obligation is such that if the above bounden Norwegian Plow Company shall well and truly save harmless and indemnify the said W. L. Rothwell, and any and all persons aiding and assisting him in the premises, from all harm, trouble, damage, costs, suits, actions, judgments, and executions that shall, or may at any time arise, come, or be brought against him, them, or any of them, then this obligation to be void, otherwise to be and remain in full force and effect.

“‘H. A. PASEWALK,

“‘J. S. McCLARY,

“‘A. P. PILGER.

“‘Signed and delivered in presence of

“‘E. B. MOWER.’

“4th. That said Rothwell, in levying said executions and selling the property thereunder, and in taking the said bond of indemnity, acted as the deputy and agent for the plaintiff, for whose benefit said bond was taken, and that said plaintiff is the real party in interest therein.

“5th. That said indemnity bond was executed and delivered by the said defendants for the purpose of saving harmless the said plaintiff in the levy and sale of the property aforesaid, and was delivered to the plaintiff by the Norwegian Plow Company with the consent of the said defendants for that purpose, and in the manner and form as aforesaid.

“6th. In consideration of said bond the plaintiff caused

said property to be sold under said executions, and paid over the proceeds of said sale, less costs, to the said Norwegian Plow Company.

"7th. That on or about the month of March, 1884, the said firm of Deere, Wells & Co. brought an action against the plaintiff for the conversion of said goods so levied upon under said executions, and on the 16th day of June, 1886, recovered judgment against plaintiff in the circuit court of the United States for the district of Nebraska for three thousand (\$3,000) dollars damages, and one hundred and ninety-eight and $\frac{65}{100}$ (\$198.65) dollars costs of suit, and plaintiff was compelled to and did pay the same and two hundred and eighteen (\$218.00) dollars accrued costs and expenses.

"8th. The said Norwegian Plow Company was duly notified of the pendency of said action, and afterwards that judgment had been rendered against the plaintiff in said cause, but that said Norwegian Plow Company and said defendants herein have failed and neglected to pay the same, or any part thereof.

"9th. That defendants though requested have failed and neglected to pay to plaintiff the said amounts as aforesaid paid by him on said judgments, or any part of the same, and have failed to save the plaintiff harmless as provided in said bond. The plaintiff has sustained damages in the premises in the sum of \$3,416.65, no part of which has been paid. The plaintiff therefore prays judgment against the defendants for the sum of \$3,416.65 and interest thereon from the day of, 1886, and costs of suit."

The attorney for the defendants contends that no action can be maintained against the sureties unless a cause of action is stated against the principal, and that the petition fails to state such cause. It will be observed that by the fifth paragraph of the petition it is alleged that "the bond was executed and delivered by the said defendants for the

purpose of saving harmless the plaintiff in the levy and sale of the property aforesaid, and was delivered to the plaintiff by the Norwegian Plow Company with the consent of the said defendants for that purpose." This allegation, if true, will constitute a waiver by the defendants of the signing of the instrument by the Norwegian Plow Company. This is a question of fact proper to be submitted to a jury, and which a court had no authority to take from them.

In 5 Com. Dig., 148, title "Officer," it is said: "That no bond or writing may be exacted from the subject to the king or other person to do that by which he is bound to do to the king, and such bond will be void and the defendant may plead duress."

The strict rule of the ancient common law has been adhered to in at least two states, viz., Massachusetts and Missouri, and the distinction between statutory bonds and those voluntarily given does not seem to be very clearly pointed out. Unless the statute under which a bond is given declares it to be void unless taken in the mode directed, it will not be held invalid if it is otherwise sufficient in form. *County of Alleghany v. VanCampen*, 3 Wend., 49. Thus, in the case cited, the statute required the bond to contain a condition, "That he shall well and faithfully execute the office of treasurer of such county and pay all moneys which shall come to his hands as treasurer, according to law, and render a just and true account thereof to the said supervisors, or to the comptroller of the of the state, when required." The condition of the bond was as follows: "That the said Moses VanCampen shall well, truly, and faithfully execute and perform the duties of treasurer of said county according to law." The court held that although it did not conform to the language of the statute, it was nevertheless a valid bond.

In *State v. Bowman*, 10 Ohio, 445, a case similar in some respects to the one under consideration, the condition of

the bond was that: "If the above bound Henry Filler, who has been elected treasurer of Perry county, shall pay over all money that shall come into his hands by virtue of his office, and do and perform all other things necessary to be done in his office as treasurer, agreeably to law, for the term of two years, and until his successor shall be elected and qualified, then the above bond to be void." This bond was not signed or sealed by the principal, although his name appeared in the body of the bond as one of the obligors. It was, however, signed and sealed by all the sureties whose names appeared in the body of the obligation. The oath of office of the principal was duly endorsed on the back of the bond, and he entered upon the duties of his office as treasurer of Perry county. He failed, however, to pay over certain moneys collected by him in his official capacity, and an action was brought upon the bond. The plea was interposed that the principal had failed to sign the bond, but the court held that the sureties were liable. It is said, page 451: "Great reliance is placed upon the fact that if the instrument is not executed by the principal it will affect the remedy over against him by the securities. There would be great force in this argument if the remedy were destroyed, but it is not; the force and the extent of this liability to them are unimpaired. Whether they could use the bond *per se* as evidence of his liability presents a question merely of convenience in the use of the right, but does not affect the right itself any more than would the loss or destruction of the bond; and a further answer to this argument is, that the bond being found in the hands of a legal depository, the auditor, the presumption, in the absence of any testimony to contradict it, is very strong that the sureties dispensed with, or, which as to its legal effect is the same thing, that they were careless about the fact whether it was signed by the principal or not."

The bond in this case is not given under any statute, unless it was attempted to bring it under section 488 of the

code, which does not require the bond to be signed by the principal. Treating it, however, as a bond voluntarily given upon a sufficient consideration, we must hold it sufficient, when the condition is broken, to authorize a recovery thereon. If the allegations of the petition are true, the Norwegian Plow Company is primarily liable for the damages sustained, and the sureties, if compelled to pay the debt, will have a remedy against such principal. The code in many cases, which need not be referred to here, has materially modified the common law by providing that certain undertakings that may be given for various purposes will be sufficient if signed by sureties alone. And this rule evidently is applicable to the case under consideration. Where the statute requires a bond to be signed by the principal, or a bond is manifestly incomplete on its face when delivered, it is probable that the sureties might insist on a failure to perfect the instrument before delivering it to the obligee, but that question is not before the court, and will not be decided. But the instrument under consideration having been voluntarily given for the express purpose of indemnifying the officer for the act set forth in the bond, he has a right to insist upon the performance of the condition by the obligors, and the failure of the principal to sign the instrument will not relieve them from liability to such officer.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

FIRST NATIONAL BANK OF ORLEANS, PLAINTIFF IN
ERROR, v. THE STATE BANK OF ALMA, DEFEND-
ANT IN ERROR.

Negotiable Instruments: FORGED CHECKS: LIABILITY OF BANK. A stranger presented to the bank of O. a check purporting to be drawn by one C. on the bank of A. for \$385. The cashier of the bank of O. compared the signature of the purported drawer with his genuine signature in a book kept by such cashier, and paid the check without requiring proof as to the identity of the person presenting the same or making inquiries in regard to him. The check was sent to a bank in Lincoln, and there credited to the bank at O., and by the Lincoln bank sent to the bank at A., on which it was drawn, and was paid by such bank. Several days afterwards it was discovered that the check was a forgery, and notice was thereupon given to the bank at Lincoln and also at O. *Held*, That the bank at O. was liable for the amount received by it on the check.

ERROR to the district court for Harlan county. Tried below before GASLIN, J.

W. S. Morlan, for plaintiff in error, cited: 1 Randolph Commercial Paper, Sec. 168. 1 Daniels Neg. Inst., Sec. 533. Parsons Notes and Bills, 590. *Levey v. Bank of U. S.*, 1 Bin. (Pa.), 27. *Bank of U. S. v. Bank of Georgia*, 10 Wheaton, 333. *Ellis v. Ohio Life Ins. Co.*, 4 Ohio State, 633.

John Dawson, for defendant in error, cited: *Natl. Bank of North America v. Bangs*, 106 Mass., 441. *Ellis v. Ohio Life Insurance Co.*, 4 Ohio State, 650. *Terry v. Bissell*, 26 Conn., 23. *Third National Bank v. Allen*, 59 Mo., 311. *Espy v. Bank*, 18 Wall., 604. *Merchants Bank v. McIntyre*, 2 Sandf., 431.

MAXWELL, CH. J.

The case was submitted to the court below upon a stipulation of facts, as follows: "For the purpose of this ac-

tion this case is submitted by the plaintiff and defendant upon the following statement of agreed facts: On or about the 1st day of January, 1886, a stranger appeared at the counter of the First National Bank of Orleans, Nebraska, and presented the foregoing check, marked 'A.' At the date of the said check and its presentation, and for a long time prior thereto, B. R. Claypool, whose check it was represented to be, was a customer of the First National Bank of Orleans, and also the State Bank of Alma, and each bank had money to his credit subject to check. And both of said banks supposed that they were acquainted with his signature. The cashier of the First National Bank of Orleans was unacquainted with the person who presented the check, and did not request him to produce any proof as to being the person entitled to the money on the check. Neither was he identified as being the A. J. Gype mentioned in the said check before paying the check. The cashier compared the signature of B. R. Claypool on the check with his genuine signature on the signature book of said bank, for the purpose of ascertaining its genuineness, and after said comparison believed said signature to be genuine, and thereupon paid said check, charging the person who purported to be A. J. Gype the sum of eighty cents exchange. At the time of paying said check said Claypool had money in the bank paying said check sufficient to pay said check. That on the 1st day of January, 1886, said First National Bank of Orleans transmitted said check to the Capital National Bank of Lincoln, which bank at the time, and was for a long time prior to that time, a correspondent of both the State Bank of Alma and the First National Bank of Orleans, Nebraska, and none of the foregoing facts were known to the Capital National Bank. That upon the receipt of said check the Capital National Bank of Lincoln, to-wit, on the 2d day of January, 1886, credited the First National Bank of Orleans with the amount of said check, and on the 4th day of January, 1886, forwarded it to the

First Nat'l Bank v. State Bank.

State Bank of Alma and charged the State Bank of Alma with that amount. Said check was endorsed both by the Capital National Bank and the First National Bank of Orleans, as appears endorsed on said check. On the 5th day of January, 1886, upon the arrival of said check at the State Bank of Alma, said bank paid the same by giving the Capital National Bank credit for the same, not knowing at the time that said check was forged. That said check was a forgery and the name of Claypool was never written by him or by his authority. On the 23d day of January, 1886, when the bank book of said Claypool was balanced at the State Bank of Alma and his checks were presented to him which had been paid by said bank, he denied the genuineness of this check in controversy, which was the first the State Bank officers knew of said check being a forgery. After knowing said check was forged, to-wit, on the 24th day of January, 1886, the State Bank officers notified both the Capital National Bank and the First National Bank of Orleans that said check was forged and charged the same back to the Capital National Bank of Lincoln, and forwarded said check to Lincoln to the Capital National Bank, who refused to take the same or to credit the State Bank with the amount thereof. That the signature of said check was very similar to the genuine signature of said Claypool; that said A. J. Gype, the payee of said check has not been heard of since the payment of said check by the First National Bank of Orleans, and was an entire stranger to all of said banks above mentioned before the presentment and payment of said check. That if the Capital National Bank is liable according to the above agreed statement of facts to the State Bank of Alma for the amount of said check, then it is agreed that judgment be given against the First National Bank of Orleans instead of the Capital National Bank.

“If under the foregoing state of facts an action would lie in favor of the State Bank of Alma directly against the

First National Bank of Orleans, and it would be liable to the State Bank under this agreed statement of facts, then judgment shall be given accordingly."

The following is a copy of the check :

"\$385.00.

ALMA, NEB., Dec. 18, 1885.

"State Bank of Alma, pay to A. J. Gype, of Alma, Neb., or bearer, three hundred and eighty-five dollars.

"B. R. CLAYPOOL."

On the trial of the cause the court found in favor of the State Bank of Alma.

On principle it would seem that a bank paying a forged check drawn on another bank would do so at its peril. That where it is proposed to draw funds belonging to another by means of a check that such check should be drawn by the proper authority. The bank to which the check is presented by a stranger may require his identification and proof that he is the lawful holder of the check. It must take the necessary steps to ascertain the genuineness of the instrument and the identity of the person presenting it, or in case of loss from such neglect it will be the party at fault. A bank receiving a check from one which has paid it may rightfully assume that the paying bank required the necessary proof, both as to the genuineness of the instrument and the authority of the holder to receive the money thereon. Ordinarily it will not be known in the second bank that the person presenting the check to the bank paying the same was a stranger and no identification was required. Nor can it be known that the drawer was not present in the bank when the check was presented and paid. The second bank, therefore, having received the check from a creditable bank, may assume that it has taken the necessary precautions to ascertain the genuineness of the signature and the identity of the person presenting the check. In this case had the plaintiff in error required the holder of the check to prove who

he was and the manner in which he came by the check, in all probability he would have declined the ordeal and the check would not have been paid. The loss, therefore, may be traced directly to the plaintiff's negligence.

The case of *Ellis v. Ohio Life Ins. and Trust Co.*, 4 O. S., 628, is similar in many respects to that under consideration. It is said, page 662: "To entitle the holder to retain money obtained by mistake upon a forged instrument, he must occupy the vantage ground by putting the drawer alone in the wrong; and he must be able truthfully to assert that he put the whole responsibility upon the drawer and relied upon him to decide, and that the mistake arising from his negligence cannot now be corrected without placing the holder in a worse position than though payment had been refused. If the holder cannot say this, and especially if the failure to detect the forgery, and consequent loss, can be traced to his own disregard of duty, in negligently omitting to exercise some precaution which he had undertaken to perform, he fails to establish a superior equity to the money, and can not with a good conscience retain it. To allow him to do so, would be to permit him to take advantage of his own wrong, and to pervert a rule designed for his protection against the negligence of the drawer into one for doing injustice to him." See also *Goddard v. Merchants Bank*, 4 Comst., 147. *Bank of Commerce v. The Union Bank*, 3 Id., 230. *Canal Bank v. The Bank of Albany*, 1 Hill, 287.

In the last case the endorsement of the payee was forged and the money paid by the drawers was recovered back, although the forgery was not discovered for two months after payment and the remedy against the other endorsers was lost.

In *Third National Bank v. Allen*, 59 Mo., 311, where a bank having paid to a stranger a check drawn upon another bank and collected the amount from the latter, at the time of the payment neither bank was aware of the

forgery. The next day after the payment the bank on which the check was drawn ascertained the forgery, and on that day or the succeeding one notified the first bank of that fact. It was held that the notice was given in a reasonable time and that the money could be recovered back.

In that case the money had been drawn on a check for the sum of \$20, payable to a stranger, who, before presenting it to the bank, had altered it by substituting \$328.68 in place of \$20, and also by changing the name of the payer, the signature to the check being genuine.

In *Espy v. Bank of Cincinnati*, 18 Wallace, 604, a check was drawn by Stall & Meyer on the defendant for \$26.50, in favor of Mrs. Hart. This was raised by substituting \$3,920 for \$26.50, and the name of Espy, Heidlebach & Co. for that of Mrs. Hart as payee. The check thus altered was presented to the bank and paid by it through the clearing house. The court held if this were all the case there would be no doubt of the right to recover. E., H. & Co., however, had sent the check to the bank before paying the same, and were informed that it was good, a question which does not arise in this case.

After a careful examination of the authorities we have no doubt that a party who pays a forged check does so at his peril, and if by means of his endorsement and use of the same he thereby obtains money from another he is liable for the amount thus received. The Capital National Bank and also the State Bank of Alma had the right to assume that an instrument sent forth with an endorsement of the plaintiffs, on which they received value, was genuine.

There is no error in the record and the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

SIoux CITY & PACIFIC R. R. Co., PLAINTIFF IN
ERROR, v. WILLIAM G. SMITH, DEFENDANT IN
ERROR.

1. **Railroads: INJURY TO EMPLOYEE.** The foreman of a company of men engaged in the business of repairing bridges, water-tanks, and telegraph lines on a line of railway, who has power to control and direct the movements of his men, will render the company liable for acts of negligence committed by him in the course of his employment, whereby one of the men under his control, without his fault, is injured.
2. ———: ———: **NEGLIGENCE OF FOREMAN.** A company of men under the control of a foreman engaged in the business of repairing bridges, water-tanks, and telegraph lines along a line of railway, in going to and from their labor on a hand car on such railway, are under the control of such foreman, and his principal is liable for his negligence occurring in the course of his employment.
3. **Verdict, Held,** To be sustained by sufficient evidence.
4. **Instructions set out in the opinion, Held,** To have been properly given.

ERROR to the district court for Platte county, whither the cause had been removed on change of venue from Madison county. Tried below before Post, J.

John B. Hawley, for plaintiff in error, cited: *Wharton Neg.*, Sec. 199. *Patterson Railway Law*, Sec. 316. 2 *Thomp. Neg.*, 1,008. *Penn. R. R. Co. v. Wachter*, 15 *Am. and Eng. R. R. Cases*, 190. *Railway Co. v. Leech*, 41 *Ohio State*, 388. *Schultz v. R. R. Co.*, 67 *Wis.*, 620. *Beach Contributory Neg.*, 38. *Meyer v. M. P. R. R.*, 2 *Neb.*, 337.

Joy, Wright & Hudson and *H. C. Brome*, on same side, cited: *Gumz v. Railroad Co.*, 52 *Wis.*, 672. *McGrath v. R. R. Co.*, 18 *Am. and Eng. R. R. Cases*, 5. *Felch v. Allen*, 98 *Mass.*, 572.

22	775
27	682
32	775
38	117
22	775
50	658
51	782
22	775
62	185
62	188

Wigton & Whitham and W. M. Robertson, for defendant in error, cited: *Wood Master and Servant*, Sec. 387. 2 *Thomp. Neg.*, 975. *Stern v. R. R. Co.*, 34 N. W. R., 113. *Ryan v. C. & N. W. R. R.*, 60 Ill., 171. *Broderick v. R. R.*, 22 N. W. R., 802.

MAXWELL, CH. J.

This case was before this court in 1884, and is reported in 15 Neb., 583, the judgment of the court below being reversed. The action is brought to recover for the alleged negligence of one King, whereby the plaintiff below sustained damages. The cause of action is stated in the petition, as follows: "Said W. King, at said time, as such superintendent and foreman, had charge and control of said hand car, and while thus having charge and control of said hand car at said time, defendant and said King negligently ordered plaintiff and others to pump said hand car up to Blair behind a freight train then starting for Blair on said railroad, and negligently ordered and permitted plaintiff and others to hold to the way car on the rear of said freight train while passing over said railroad, and negligently failed to inform plaintiff of the danger, if any there was, of so propelling said hand car at that time and place, plaintiff being ignorant of any such danger, and negligently failed to order plaintiff to let go of said way car before arriving at the curve in said road, and before the train was running at a dangerous speed, and before the accident occurred, and negligently managed and controlled the running of said hand car while passing over said road from the Missouri River to the place of the injury herein complained of, and negligently applied the brake to said hand car while the same was in rapid motion, and negligently failed to inform plaintiff that the brake was about to be applied to the hand car before the application of the same, by reason of which negligent conduct plaintiff was

thrown from said hand car and greatly injured in his head and eyes, and has been ever since the said 18th day of August, 1880, and still is, sick and maimed, and has suffered and still does suffer greatly in mind and body, and ever since said day has been unable to perform any labor or earn any money except the sum of \$4.00, and is incapacitated for labor in the future, and has been compelled to expend the sum of \$185 for medical services and attendance. The plaintiff has sustained damages in the premises in the sum of twenty-five thousand dollars."

The railroad company, in its answer, "Admits that on said day and year W. King was in the employ of defendant, and that he was assisting in the construction and repair of bridges and water-tanks, but denies that he was superintendent of said work and foreman of said body of workmen at the time and as in said petition alleged."

There are certain other admissions which need not be noticed, and specific and general denials of the facts stated in the petition. On the trial of the cause the jury returned a verdict in favor of Smith for the sum of \$10,000, upon which judgment was rendered.

In addition to the general verdict the jury were required to answer certain questions, which they did as follows:

"Had the plaintiff commenced to fall when King applied the brake to the hand car? No.

"Had the plaintiff's eyes been sore or inflamed before the accident complained of occurred? No.

"Do you find that the present diseased condition of plaintiff's eyes is the result or consequence of defendant's wrongful and negligent act? Yes.

"GEO. W. WESCOTT,

"Foreman."

The errors assigned in this court by the railroad company may be grouped under three heads: First, that the evidence is not sufficient to sustain the verdict; second, that the injury to Smith was not the result of being

thown from the hand car ; and third, error in giving and refusing instructions.

The testimony tends to show that Smith commenced to work for the railroad company under Mr. King as foreman in November, 1879, and that he continued in such employment under Mr. King until the time of the accident ; that the business in which they were engaged was repairing bridges, landings, water-tanks, and the telegraph line ; the company seem to have been known as the "tank, bridge, and telegraph gang." On the day the accident occurred the company in question was engaged in making a sixty-foot mast on the west side of the Missouri river at or near the Blair landing, for the purpose of running telegraph wires across the river ; that the track at the point indicated ran nearly north and south for some considerable distance and then curved nearly due west, and run into the city of Blair ; that there is an up grade all the way from where the parties were at work to said city ; that on the day above stated, shortly after six o'clock P.M., King, the foreman, directed his company, including Smith, to place the hand car on which they were accustomed to travel on the track, and as there was a freight train a short distance ahead going up to Blair to run the hand car up to the train and be towed up by it, the train at that time running from one to two miles per hour ; there was a strong wind blowing from the north-west at the time. The speed of the train gradually increased, and as it neared the curve turning west to the city of Blair it was running from six to seven or eight or nine miles per hour, the witnesses disagreeing as to the exact rate of speed. When the hand car was run up behind the train three of the company, including Smith, with the assent of King, if not by his direction, took hold of various parts of the rear part of the way car, so as to propel the hand car by means of the train. As the train approached the curve, King, fearing to go around the curve at the high rate of speed, called to the

S. C. & P. R. R. Co. v. Smith.

members of his company holding on to the way car to let go; this order was heard by none of them; he called the second time and the second order was unheard; he then the third time ordered those men to let go of the way car; two of them heard the order and immediately let go. Smith claims that he did not hear the order and that he held on to the way car, and that King applied the brake to the hand car, thereby violently breaking his hold on the way car and causing him to lose his balance and to fall from the car, striking his face on a hard substance, whereby he sustained severe injuries which have since resulted in total blindness.

In *C. S. P., M. & O. R. R. Co. v. Lundstrom*, 16 Neb., 254, it was held that, "A conductor of a construction train on a railroad, with a gang of men engaged to work as day laborers for the railroad company, but under the immediate orders of such conductor, is, as to such men, the vice principal of the railroad company and not a fellow servant of such men. And an act of gross negligence on the part of such conductor, whereby the lives of such men are placed in jeopardy while working under his immediate orders and direction, and one of them is killed, is the negligence of the company, for which it is liable."

In *B. & M. R. R. Co. v. Crockett*, 19 Neb., 138, the following points were decided: 1st. "The under boss of a gravel train gang was directed by his immediate superior to take men and dig out a car which had been partly covered and derailed by a fall of gravel from a high bank near by, and in pursuance of such order proceeded to dig out the car, and while so employed was killed by the embankment caving in. Prior to that time the custom had been to station a watchman to give notice to the workmen of danger from the falling bank, which was omitted on that occasion. *Held*, That the company was liable."

2d. "The conductor of a gravel train on a railroad, with a gang of men under his immediate control, in the

employ of the railroad company, is, as to such men, the vice principal of the railroad company and not a fellow servant."

3d. "A sub-boss under the immediate control and direction of the conductor or the person in charge of a gravel train is not, as to such conductor or person in charge of the train, a fellow servant."

The testimony clearly shows that King was the vice-principal of the railroad company within the cases cited. Smith was subject to his orders and bound to obey, and he had a right to presume that King would not permit the hand car to be run at such a rate of speed, either by attaching it to the train or otherwise, as to endanger the lives or limbs of the persons placed thereon. Mr. King must have known when he ordered some of the members of his company, including Smith, to run the hand car up to and attach themselves to the way car that the train was liable to increase its speed and to go around the curve in question at so rapid a rate as to render it dangerous. He must have known, too, that with the wind blowing strongly from the north-west, being directly against them, and the rattle of the cars, the almost impossibility of making his orders to Smith and the others to loose their hold on the way car heard. But he seems to have taken no extra precautions to notify those parties of his order. The fact that it was twice unheard by all certainly should have induced him to adopt some other means of notifying the parties in addition to simply speaking to them. Immediately on ordering the members of his company to loose their hold on the way car for the third time, King seems to have applied the brakes to the hand car, and thereby checked its speed, causing Smith to lose his balance and to sustain severe injuries. That this accident was caused by the negligence of King in his directions and control of the hand car, we think is clearly established, and the verdict in that regard fully sustained.

The testimony shows that Smith was blind at the time of the trial. He and a number of witnesses swear that this blindness resulted from the injuries above set forth. There is testimony tending to show that the inflammation of his eyes arose from other causes, but in our view the preponderance of the testimony sustains the verdict in that regard. Some objection is made to the amount of the verdict, but if blindness has resulted from the injury set forth the amount is not excessive.

Objection is made to the 10th paragraph of the instructions, which is as follows: "If you find for the plaintiff upon both the issues stated above, namely, that the said King was guilty of negligence which contributed to the injury complained of, you will then determine from the testimony whether or not plaintiff was, at the time he received the injury, in the discharge of his duty and in the line of his employment; and upon this question, also, the plaintiff is required to produce the burden or preponderance of proof. If you find that the witness, Mr. King, was employed as superintendent of construction or repair of defendant's bridges and similar work on its line of road, and as such superintendent he had control of, and authority over, a gang or company of men, including plaintiff, with authority to employ and discharge men in the name of the defendant, then the acts of the said King toward said men while acting within the line of his duties would be the acts of the defendant company, for which it would be responsible. And in such case, should you find that the plaintiff and others on the hand car took hold of the caboose on the freight train by order of or under the directions of said King, for the purpose of towing said hand car from the river to Blair, then in obeying said order and in carrying out the instructions of said King, the plaintiff should be said to be in the discharge of his duty and acting in the line of his employment, and if said King negligently applied the brake to said hand car while plaintiff was still

holding onto the freight train, and plaintiff received the injury complained of as the natural and direct result of said negligence, without fault or negligence on his part as already explained, the defendant would be liable, and you should so find."

The testimony tends to show that, in going to and from Blair on the hand car, Smith and his associates were under the control of King; there is no error, therefore, in giving the instruction. *Manville v. Cleveland & Toledo R. R. Co.*, 11 O. S., 417. *Broderick v. Detroit Union Railroad Station and Depot Co.*, 22 N. W. R., 802. *Pittsburg, C. & St. L. Ry. Co. v. Kirke*, 1 N. E. R., 849.

Objection is also made to the 12th paragraph of the instructions, which is as follows: "If you find the plaintiff is entitled to recover, your next and last duty would be to determine the amount of damage which should be assessed in his favor. If you find in his favor you should allow such damages as will reasonably and fairly compensate him for the injuries he has suffered as the natural and proximate consequence or result of the defendant's wrongful and negligent act. And here an important question is presented for you to settle from the testimony, namely: Is the present diseased condition of plaintiff's eyes the result of the injury received while in the defendant's employ for which this suit is brought? Upon this question, also, the burden of proof rests upon the plaintiff, and if you are not satisfied by a preponderance of the testimony that such disease of the plaintiff's eyes is the result of defendant's negligence, then in assessing damages in his favor you should not take such disease into consideration."

It is claimed on behalf of the railroad company that the court assumes in the above instruction that the defendant was negligent. A careful reading of the instruction, however, will show that this position is not sustained.

Objection is also made to instruction number one, given by the court at the request of the plaintiff below, which is

as follows: "If you find from the evidence before you that plaintiff, while riding on the hand car, just before or at the time of the injury, was in a dangerous position, and that King knew plaintiff was in such a position, and that King after being aware of that fact might, by the use of a proper degree of care, have prevented the injury, the defendant cannot rely on the negligence of plaintiff, if any there was in being in such a position, to defeat a recovery in this case. The degree of care required by King under such circumstances is in proportion to the peril threatened, and is such care as an ordinarily prudent man, under the same circumstances would exercise to prevent the injury."

This instruction, in our view, conforms to the testimony, and there is no error in giving the same.

Objection is also made to instruction number two, given at the request of plaintiff below, which is as follows: "If you find from the evidence and the instructions given you that the plaintiff is entitled to recover, it will be your duty to fix and ascertain from the evidence the amount to which he is entitled. You should carefully examine all the evidence as to the nature, character, and extent of the injury, and the result; whether the disability, if any resulted from the injury, is permanent or temporary; its extent, whether total or partial. If any permanent disability resulting, you should consider plaintiff's age, his reasonable expectancy of life, how much money he could earn as he was before the injury, how much, if any, he could earn with his reduced capacity, if any there was on account of the injury, and allow him reasonable compensation for any loss of time and capacity resulting from the injury. You should also allow him for his suffering. The law lays down no rule for estimating his damages on this account, but leaves it to your sound judgment. And you should allow such amount as in your best judgment would be just under the circumstances, not exceeding in all the sum claimed—\$25,000."

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This, we think, is a correct statement of the law, and there is no error in giving the same.

A number of instructions were given on behalf of the railroad company, and two were refused, apparently upon the ground that certain facts were assumed, and it is evident that the court did not err in refusing to give the same. The instructions taken as a whole state the law at least as favorably to the railroad company as the testimony would justify, and upon the whole case the judgment is right and is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

E. A. MUSSELMAN, APPELLEE, v. LILLIAN J. BRADLEY
ET AL., APPELLANTS.

Mortgage Foreclosure: DEFENSE: CONSIDERATION. In an action to foreclose a mortgage given to secure two promissory notes, each for the sum of \$250, with interest, it appeared as a defense that the notes were given for an alleged stock of goods having but little or no intrinsic value and salable only as auction goods, the real value of which did not exceed one hundred dollars. *Held*, That the decree will be reduced to one hundred dollars, with interest from the date of sale.

APPEAL from the district court of Harlan county.
Heard below before GASLIN, J.

Oyler & Beall and *James McNeny*, for appellants.

John Dawson, for appellee.

MAXWELL, CH., J.

This is an action to foreclose a mortgage given to secure two promissory notes, each for the sum of \$250. The

Musselman v. Bradley.

notes and mortgage are signed by both husband and wife. The defendants file separate answers. That of the husband is as follows:

"That on or about the day of, 1885, this defendant and the plaintiff Musselman entered into a contract, by the terms of which said Musselman agreed to and did sell and transfer to this defendant certain goods, wares, and merchandise then belonging to said Musselman, upon the terms and conditions following, to-wit: The defendant should purchase the said goods at a price which was then agreed upon, and should thereafter proceed to sell the same for the best prices which he could obtain therefor, and out of the proceeds of the sales made by this defendant he was to pay the said plaintiff for the said goods, but the said defendant was to be in no manner liable for the purchase price of said goods, except to such extent as he might realize out of the sale thereof. At the time of the making of said contract, and as one of the conditions thereof, the said Musselman represented and warranted the said goods to be the same in quality, quantity, and bulk as those described in a certain invoice or inventory there delivered by said Musselman to this defendant. And defendant says that at the time the said plaintiff made the said representations and warranty he knew the same to be false and fraudulent, and knew that the said goods were not in quality and quantity the same or similar to the goods described in said inventory or invoice, but were greatly inferior in value, were wholly worthless and unsalable, and of no use or value whatever. That said defendant, relying upon the said false and fraudulent representations of plaintiff, took and accepted said goods under the said contract, but that, upon finding that said goods were utterly unsalable and worthless, he offered to return the same to the said plaintiff, but the said plaintiff refused to take back or receive the same. That the note and mortgage in controversy, though given nominally to secure the sum of

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\$500, were in reality given to secure faithful performance of the contract aforesaid on the part of this defendant. And this defendant says he has on his part faithfully performed the said contract, and if any default has accrued therein it has accrued by reason of the false and fraudulent representations and other wrongs of the plaintiff; and the defendant further says that at the time of the contract aforesaid he was drunk and intoxicated, and utterly unfit and incompetent to transact any business whatever. That the said plaintiff knew of the defendant's drunken and intoxicated condition, and so knowing, and intending to cheat and defraud this defendant, caused and procured him in his said drunken and intoxicated condition to enter into the contract and to execute the notes and mortgage aforesaid. That the said notes and mortgage were executed for no o'her consideration and with no other end or purpose in view than as aforesaid."

The answer of the wife is substantially the same as that of the husband.

The reply is a general denial.

On the trial of the cause the court found in favor of the plaintiff, and rendered a decree for the full amount claimed.

There is a large amount of testimony in the record, from which it appears that the plaintiff sold to the defendants an alleged stock of goods, inventoried at about \$2,800. The undisputed testimony also is, that the intrinsic value of the goods was but little or nothing. They evidently were remnants, picked up here and there. The woollen garments were out of fashion and moth-eaten, and almost every article, the testimony shows, was damaged and unsalable. The testimony also shows that these goods were in boxes in the cellar when the defendants purchased them. The plaintiff does not claim that the goods were merchantable, but says that the defendant examined them before purchasing. The defendant states that he merely examined a few articles in one box, there being thirteen or fifteen

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boxes in all. The plaintiff's testimony upon many points is evasive and very unsatisfactory. He testifies as follows:

Q. What condition were the goods in?

A. What I regarded fair condition for auction goods.

Q. What kind of parasols were they, paper or cloth?

A. I never examined them particularly.

Q. Did you not take them all out?

A. Yes, sir.

Q. You did not examine them?

A. No, sir, he did. I helped take them out. I suppose they were Japanese parasols, and I could not say as to their quality.

Q. They were paper?

A. I don't know.

Q. Are not the Japanese parasols always made of paper?

A. They might be.

Q. Did you ever see any Japanese parasols that were not paper?

A. I don't know that I have.

Q. Don't you know that these parasols were paper?

A. I don't know that they were.

Q. Then you don't know whether you sold him the goods in that inventory?

A. Well, he compared them himself.

Q. All you can judge from is the inventory?

A. Yes, sir.

Q. What was the condition of the coats?

A. They were mostly in good, fair condition I think.

Q. Were there holes in them?

A. I think not.

Q. What was the condition of the nubias?

A. Fair condition.

Q. Were they in the same condition as those you had up in the store?

A. Yes, sir.

- Q. Why not have them up there?
 A. Well, there were more than we could use.
 Q. You are used to handling goods?
 A. Yes, sir.
 Q. You put them down in that cellar when?
 A. I think in September.
 Q. In what kind of a box were the nubias put?
 A. I don't remember.
 Q. Do you say that you packed such goods as you sell in your store in September, in the cellar?
 A. I mean to say I did.
 Q. Did you examine these nubias carefully that day?
 A. We took them all out and put back in again.
 Q. It took you all day to do that?
 A. Yes, sir.
 Q. How many boxes were there?
 A. Thirteen or fifteen.
 Q. You and Bradley were working all the time?
 A. Yes, sir.
 Q. Where did you get these goods from?
 A. I bought them.
 Q. Who of?
 A. Some in New York, some in Chicago, and some everywhere.
 Q. How long had you had them?
 A. Well, I can't say.
 Q. Did you buy any in this town?
 A. Perhaps, some of them.
 Q. Who did you buy of here?
 A. Well, the stock I bought was from John Compton.
 Q. How much of these goods was from the Compton stock?
 A. I can't say.
 Q. How long had you had that Compton stock?
 A. Well, I have been selling it ever since.
 Q. Some of this stock was from the Compton stock?

A. It might have been.

Q. You bought the Compton stock right out, in a lump?

A. Yes, sir.

Q. You did not keep track of the goods?

A. Yes, sir, we generally know about what we have.

Q. And generally know where you get them?

A. We could tell by looking up the bills.

Q. Was it an old stock?

A. I could not tell you.

Q. You examined the stock?

A. Yes, sir.

Q. Could you tell?

A. Well, not exactly.

Q. When you went down in the cellar could you tell it was an old stock there?

A. Yes, sir.

Q. You were selling these suits from eight to twelve dollars a suit?

A. Well from six to twelve dollars I think I said.

Q. Were these men's suits that you sold?

A. Well, some of them.

Q. Were you selling these musty suits from six to eight dollars apiece?

A. They were not musty when I put them down there.

Q. You don't mean that these musty suits down there were worth eight to twelve dollars apiece?

A. Yes, sir, if you could get it.

Q. When you put these goods down cellar, did you take these nubias right off from your shelves?

A. Yes, sir, I think so.

Q. What kind of goods are they?

A. They are woolen goods.

Q. You took them from your shelves in September and put them down cellar?

A. Yes, sir, to make room for our fall goods.

Q. Did you pack them carefully down there?

A. We usually put tobacco in the goods when we pack them.

Q. Was there a tobacco smell down there when you opened them?

A. I think there was.

Q. You know that you put tobacco in them when you packed them?

A. No, sir, I don't know it. I did not pack all of them. I thought there was a tobacco smell there.

Q. You don't remember now that there was a tobacco smell there?

A. Not positively.

Q. What condition were those ladies' hose in?

A. They were in fair condition.

Q. Were all the goods in fair condition?

A. In reasonably good condition as auction goods. They were in a fair salable condition.

Q. All of them?

A. Most all of them.

Q. If they were in a fair salable condition this price affixed to them here in this inventory was a fair price?

A. I did not make any price on them.

Q. I ask you if this price here in this inventory is a fair price for goods of that quality?

A. We put them at what we thought they were worth in that inventory.

Q. Has anything since occurred to change your mind as to their value?

A. Well, they have been down in the cellar and got a little musty.

Q. That is the only thing, is it?

A. Well, I don't understand your question.

Q. When you made this inventory was when the goods were put in the cellar?

A. I think so.

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The other testimony given by him is of the same nature. All the witnesses called on behalf of the plaintiff were connected with him, either by blood or marriage, and by their testimony it is apparent that the goods were of very little intrinsic value. They are spoken of as "auction goods," by which we are left to infer they could be sold in no other way. The defendants testify that they had been unable to sell them at auction, or in any other mode, and that they were rotten and almost worthless. In this they are corroborated by several other witnesses. The testimony also shows that the defendants, soon after the goods were received, offered to return the same to the plaintiff, and he refused to receive them. It is shown that goods to the value of \$40 have been sold, and that the real value of the whole would not exceed one hundred dollars. The claim of the plaintiff that the defendant examined the goods before taking them out of the cellar is not sustained by a preponderance of the testimony, and it is evident that such examination was not made until after the execution of the notes and mortgage in question. The mortgaged property in this case is the homestead of the defendants, and the testimony tends to show that it was purchased and paid for by the wife. The decree of the district court for the full amount of the face of the notes, with interest, and directing a decree of foreclosure upon the property in question therefor, is reversed, and a decree will be entered for the sum of one hundred dollars, with interest thereon, the value of the goods at the time of the purchase.

DECREE ACCORDINGLY.

THE other judges concur.

22	792
49	563
22	792
60	576

THE STATE OF NEBRASKA, EX REL. HENRY T. CLARKE,
v. G. P. CATHER ET AL.

Counties: ESTIMATE FOR TAXES. Where an account has been duly allowed against a county in a case where the county board had jurisdiction, it is the duty of such board to include the same in its estimates of the taxes to be levied for the ensuing year, and if it fails to do so it may be compelled by mandamus to perform its duty.

ORIGINAL application for mandamus.

Pound & Burr, for relator, cited: *State v. Dodge County*, 10 Neb., 20. *State v. Lancaster County*, 13 Neb., 224. *Lancaster County v. State*, Id., 523.

J. S. Gilham, for respondents, cited: Comp. Stat., Sec. 37, Ch. 18.

MAXWELL, CH. J.

This is an application for a peremptory writ of mandamus. The plaintiff alleges in his petition that: "On the 11th day of January, 1884, J. E. Smith, J. L. Miller, and John McCallen were the duly elected and qualified board of county commissioners of said county of Webster, and on that day, at a regular meeting of said board, at the county seat of said county, and having jurisdiction over the parties and the subject-matter, the following allowances and adjustments, settlement, order, and judgments were rendered by said board in favor of this relator, viz.:

"The board made a settlement with H. T. Clarke, of Omaha, contractor of bridge built in 1874 in this county, and made a correction of an endorsement on one contract in error, and transferred it to another contract in the proper place; also found on bill for balance due on bridge across the Republican river, filed October 6th, 1874,

State v. Cather.

amounting to \$2,924.10. The following endorsements: "Paid in warrants Nos. 19, 20, 21, and 22, dated July 1st, 1875, for \$500, \$500, \$500, and \$236.22, respectively." Also endorsed on said bill the following, which were not endorsed at the time of the issuing of the warrants, as follows: "\$136.96 issued on the contract July 13th, 1880, in warrants No. 28, \$948.52 issued July 8th, 1881, in warrants Nos. 1 and 2 on special bridge fund," and then found that there is due to H. T. Clarke, on the 11th day of January, 1884, the sum of \$1,605.71 and interest.

"J. P. BAYAM,

J. E. SMITH,

"County Clerk.

County Commissioner.'

"In January, 1884, the said board met and made an estimate for the expenses for said Webster county for the year 1884, and among other things declared and found that there should be a levy for special county bridge fund, H. T. Clarke account, the sum of \$3,000. On and prior to the 28th day of January, 1887, this relator had several times requested said defendants to make an estimate of relator's said judgment, and to levy a tax for the payment of the same, and after a great many delays on the part of said defendants, on the said 28th day of January, 1887, the said board of supervisors, at the county seat of said county, at a regular session and meeting of the said board, did refuse to make an estimate of said judgment and to levy a tax to pay said judgment and amount so found due as aforesaid, and your relator has no knowledge why said board of supervisors refuse to make an estimate and levy a tax to pay said judgment, and it is the duty of said board of supervisors, the defendants, under the laws of the state of Nebraska, to levy said tax and pay your relator said money and interest at the rate of ten per cent per annum until paid, as by terms of the contract between your relator and said defendants is fully shown, a true copy of which contract is hereto attached and made a part hereof,

and it was in disregard to their said duty, when, on the 28th day of January, 1887, they refused so to do."

There are other allegations to which it is unnecessary to refer. To this petition the defendant filed an answer, in which they plead the judgment is invalid for the following reasons:

"1st. At the time of said pretended judgment and allowance, there was no funds of said Webster county against which warrants might or could be drawn in payment of said judgment, and there was no money in the county treasury of said county out of which said judgment might be paid.

"2d. That said relator did not before said pretended judgment of allowance, or at any time, file any verified claim against said Webster county, nor has there ever been a verified claim filed at any time by or for said relator against said county of Webster.

"3d. At the time of said pretended allowance relator had no claim or demand whatsoever against said Webster county, and presented no such claim or demand.

"Defendants further answering say that during the year 1874, the relator built and repaired portions of a bridge across the Republican river in said county, for which he received a large amount in warrants before the commencement of his work, and subsequently, on the 6th day of October, 1874, presented his account for balance due, viz., \$2,924.10, which amount was on said date duly allowed him, and subsequently, on the 8th day of December, 1874, an account was duly allowed for \$492.80. Warrants were duly issued to said H. T. Clarke far in excess of what was necessary to pay such allowances, and on July 5th, 1876, the then board of commissioners of said county issued to said H. T. Clarke warrants in the sum of \$506.⁶⁰/₁₀₀, which warrants were ordered issued by said board upon condition expressed in the following words written upon their records and published as the minutes of

their proceedings: 'As a balance due on bridge across Republican river, less expense of county on same,' which warrants were duly received by said H. T. Clarke without objection to, and in compliance with, the said record. Said H. T. Clarke, relator, has never done or pretended to have done any service, or rendered any consideration for said Webster county, except during the year 1874, as aforesaid. That the only allowance made to him by any board of commissioners of Webster county are those above stated, made on the 6th day of October, 1874, for \$2,924.10, and one on the 8th day of December, 1874, for \$492.80; that since said allowances he has received the warrants of said county in sufficient amounts to pay said allowances and the interest accruing thereon, which warrants have long since been paid to said Clarke in full in money. And such accounts and allowances were at the time of the pretended allowance in 1884 fully paid and satisfied.

"Defendants further answering submit that the pretended allowance is not in law an allowance or judgment on its face, but only a computation of what might be due on the allowance made October 8th, 1874, which said computation the said board had no authority to make as a record or judgment, and which said computation is erroneous in that it makes no account of two thousand dollars of warrants before that time delivered to and received by said Clarke."

The relator demurs to this answer, as not constituting a defense to the action. The petition is not as definite as it should be. There is no statement of the exact amount claimed to be due the relator at the present time, nor of the amount received, if anything, from the special levy in the year 1884. It is apparent, however, that something is still due the relator from Webster county upon said claim. The answer fails to set forth the facts as to the alleged payments. That is, there is no statement as to the cost or contract price of the bridge and the amount paid thereon.

There is a denial of the authority of the county board, in 1884, to make the allowance, and it is claimed that there is no verified account filed with the board. But the account evidently had been pending before such board for a number of years and had been acted upon by it. There is no claim of fraud or undue means in procuring the allowance of the account, and the allegations are too vague and indefinite to constitute a defense. *Clark v. Dayton*, 6 Neb., 192.

The granting of a writ in this case does not necessarily establish the fact that a definite sum is due from the county to Clarke, but merely that it is the duty of the county board to provide for what is due. The case, however, seems to fall within the rule laid down in *Clark v. Dayton* that where a bridge had been accepted and the claim therefor allowed, the remedy of any person aggrieved is by appeal. A peremptory writ will therefore issue requiring the defendants at their session in January, 1888, to make an estimate of the amount due the relator, and at the proper time levy taxes for the payment of the same.

JUDGMENT ACCORDINGLY.

THE other judges concur.

REUBEN BOLLMAN, PLAINTIFF IN ERROR, v. JAMES LUCAS, DEFENDANT IN ERROR.

1. **Witnesses: EXAMINATION: OPINIONS.** A witness on his examination-in-chief, or re-examination by the party calling him, when on account of his possessing special knowledge, skill, or experience, is permitted to give his opinions or judgment on a question of quality or values, if he is permitted to give the source of his special knowledge, experience, or skill, it will be confined to general statements. And when he is permitted to narrate the facts and circumstances of a special transaction, outside of the case on trial, for the purpose of enabling

22	796
37	603
37	821
23	796
39	649
22	796
52	372
22	796
61	240

Bollman v. Lucas.

the jury to compare the facts and results of such transaction with those of the case on trial, and in that manner impress them with the soundness of his opinion or judgment; *Held*, Error.

2. **Sale: FRAUD.** To avoid a sale upon the ground that it is fraudulent as to creditors, the purchaser must have knowledge of the fraudulent purpose of the seller, or have notice of such facts tending to show a fraudulent purpose as would put a man of ordinary prudence on inquiry. *Temple v. Smith*, 13 Neb., 513.

ERROR to the district court for Knox county. Tried below before CRAWFORD, J.

Cleland & Lothrop, Wigton & Whitham, Bartlett & Cornish, and *E. F. Gray*, for plaintiff in error, cited: *Tootle & Maule v. Dunn*, 6 Neb., 93. *Templin v. Smith*, 13 Id., 513. *Brunswick v. McClay*, 7 Id., 137. *Wait Fraudulent Conveyances*, Secs. 379, 380, and 381. *David v. Birchard*, 10 N. W. R., 557.

H. C. Brome, for defendant in error, cited: *Bickler v. Kendall*, 24 N. W. R., 518. *Clemens v. Brillhart*, 17 Neb., 337. *Boggs v. Thompson*, 13 Id., 405. *Gray v. St. John*, 35 Ill., 222. *Shelley v. Boothe*, 73 Mo., 74. *Crawford v. Kirksey*, 55 Ala., 282.

COBB, J.

This was an action of replevin in the district court of Knox county. The plaintiff in error, defendant in the court below, is the sheriff of said county. His answer was a general denial, and on the trial he sought to justify the taking and detention of the property replevied, which consisted of a stock of general merchandise, under five several orders of attachment issued in as many several actions pending in the district court of said county against McClintock & Wilson, whose property he claimed the said replevied goods to be.

There was a trial to a jury with a verdict and judgment for the plaintiff. The defendant brings the cause to this court on error, and assigns fifty-one errors. It is not deemed necessary to set out these assignments here, as without passing upon either of the other questions involved in the case this opinion will be confined to those arising upon the admission of certain testimony offered by the plaintiff, and the giving and refusal by the court of certain instructions hereinafter specifically referred to.

From the evidence of the plaintiff, defendant in error, it appears that McClintock and Wilson, of Creighton, were engaged in mercantile business, having as their stock in trade the goods in controversy. They owed him the sum of fifteen hundred dollars on the original purchase of the said business by them. This debt was long past due, and had been renewed, or payment postponed from time to time. About the 1st of June, 1885, they wrote to him at his residence in Wisconsin, to the effect that they were likely to be pushed by other creditors, etc. This induced him to come out to Creighton to look after and collect the said debt. Almost immediately upon his arrival at Creighton, the attorney of Paxton & Gallagher, of Omaha, who had a demand of \$1,719.08 against McClintock & Wilson, appeared on the scene and threatened to take out an attachment. Thereupon Lucas, the defendant in error, purchased the stock of goods from McClintock & Wilson, and taking out of the consideration his own claim, also paid the said claim of Paxton & Gallagher, and claims of other creditors of McClintock & Wilson, held by the banks at Creighton against them for collection, amounting in all to the sum of \$4,575, the consideration named in the bill of sale thereupon executed and delivered by the said McClintock & Wilson to Lucas. It appears that the stock of goods and book accounts described in and conveyed by the said bill of sale to Lucas, constituted the entire, or nearly the entire property and assets of the said

McClintock & Wilson, leaving the claims of the attaching creditors, amounting to \$4,148.42 unprovided for. It is quite impossible to arrive at the value of the goods and accounts from the evidence, but it may be assumed that the evidence tends to fix it at nearly twice the amount stated as the consideration of the bill of sale. No invoice of the stock was taken before the sale, but one was commenced immediately after the transfer but never completed, having been interrupted by the attachment proceedings. Invoices and appraisements were however made of the goods taken on the several orders of attachment, covering the entire stock of goods, but the appraiser scarcely pretended to place a true value upon them. The goods were also appraised when taken by the coroner on the order of replevin. The amount of such appraisement appears to have been \$5,502⁴²/₁₀₀.

Upon the trial Mr. S. J. G. Irwin, not Cowin, as plaintiff in error has it in the brief, was sworn as a witness on the part of the plaintiff. This witness was also one of the appraisers summoned by the coroner to appraise the goods, and who assisted in the discharge of that duty. Upon his examination-in-chief he was asked by counsel for the plaintiff:

Q. What were those goods worth on that market at that time?

He answered:

A. Probably thirty-five or thirty-six hundred dollars.

The witness was then cross-examined by counsel for the defendant. And upon his re-examination counsel for plaintiff asked him the following question:

Q. Mr. Irwin, how long was it after this appraisement was made by you that you took charge of another stock of goods there in the town of Creighton as assignee?

Defendant objected as not being proper re-examination, and as being immaterial and incompetent, which objection was sustained by the court. Counsel for the plaintiff then

submitted the following offer: "I offer to prove, upon re-examination, by the witness, that a short time or some time after the appraisal was made, that he had been interrogated with reference to—within six months afterwards, at Creighton in Knox county, as assignee he took charge of a stock of general merchandise, similar in character to the stock appraised in this case, and contained in the same room in which this stock had been kept, and that he sold the same at retail for cash for some two months, and closed the bulk out, and sold the bulk for cash—the balance. That the stock of goods was a better selected and more desirable stock than the one in controversy in this case, and that the total amount realized was less than fifty-five per cent of the cost price of the stock." Defendant objected as being incompetent and not proper re-examination, and in no particular fixing the value of the goods in question. The objection was overruled by the court. Thereupon counsel asked of the witness the following question:

Q. You may state how long after this appraisal was it that you took charge of this other stock of goods?

Defendant objects as being incompetent and not the proper way to ascertain the value of the goods in controversy, and not proper re-examination. Objection sustained by the court. Thereupon counsel for the plaintiff asked of the witness the following question:

Q. You may state whether or not you took charge of a stock of goods in Creighton since this appraisal, as assignee?

Defendant objects as being incompetent, and not the proper way to ascertain the value of the goods in controversy, and not proper re-examination. Objection overruled by the court. Whereupon the witness answered:

A. Yes, sir, I did.

Counsel continued the examination:

Q. When was that?

Counsel for defendant objected as last above, which objection was overruled by the court, and witness answered :

A. I took charge of the store on the 18th day of January, 1886.

Q. You may state whether or not the goods that you took charge of were of the same class and character of the goods contained in the stock that you appraised ?

Defendant objects as being incompetent, not the proper way to ascertain the value of the goods in controversy, and not proper re-examination, and because the period is too far removed, some seven months from the time of the replevin in this case. The objection was overruled, and the witness answered :

A. Yes, sir. They were similar and the same class of goods. It was a general stock.

Q. Well, how did they compare with the stock in controversy in quality ?

Defendant objected as last above, with the same ruling, and witness answered :

A. They were a little newer stock of goods. They hadn't been on the shelf as long. They were a very good stock of goods.

Q. What do you say as to whether they were a better stock than the McClintock & Wilson stock ?

Defendant objected as above, with the same ruling.

A. I think they were some better. As I said before, they were not quite as old a stock of goods.

Q. Now you may state, if you know, whether there was any actual difference in the value of that class of goods—that is, whether or not that class of goods were different in value, or their value was different, in January, 1886, when you took possession of this stock, from what it was in June, 1885, when you appraised the other stock ?

Same objection and same ruling.

A. Taking the stock in general, I don't think there

would be any difference particularly ; of course there may have been a little difference in a few articles.

Q. You may state, if you know, in what manner this last stock was disposed of—how it was handled?

Same objection and same ruling.

A. That is, you want to know from the time the assignment was made?

Q. Yes, sir.

A. The sheriff first took charge, and the sheriff sold goods out of the store. I think in the neighborhood of thirty days, at retail, and I went in on the 18th day of January, and I sold goods until March. Some time, I think about the 8th or 9th, that I closed the store and took an account of what I had to sell—the balance that was in the store—and sold the bulk for cash.

Q. Now, then, sir, you may state if you know what per cent of the cost price, with the freight added, of the goods was made in that sale?

Objection as before, with the same ruling.

A. Yes, sir.

Q. You testified upon your direct examination that the goods in controversy in this action were worth, at the time that you appraised them, thirty-five or thirty-six hundred dollars. You also testified, in answer to Mr. Gray, that you had appraised the goods at something less than fifty-six hundred dollars. You may explain to the jury why you make the two different valuations.

Objection as above, and as leading. Same ruling.

A. I fixed it the same as this last stock of goods that I have just handled. We didn't realize as much as we supposed we would on that stock, and I put this the same as I did on the other stock. I rather thought we got it a little high on that appraisement. I never had had any experience at the time that we took that appraisement, in selling goods like that—in selling bankrupt stocks.

I know of no principle of law or theory of evidence

upon which the above rulings of the trial court can be justified. While the testimony of witnesses is usually directed to facts, it is, in such cases, confined to the facts of the case on trial. And when an expert, or one who, on account of his possessing special knowledge or experience, is permitted to give his opinion or judgment on a question of quality or values, if he is permitted to give the source of his special knowledge, experience, or skill, he will be confined to general statements and will not be permitted to narrate the facts and circumstances of a special transaction for the purpose of enabling the jury to compare the facts and results of such transaction with those of the case on trial, and in that manner impress them with the soundness of his opinion or judgment. It is probable that the questions objected to would be permissible on cross-examination, but not in the examination of a witness in chief or upon his re-examination by the party calling him. These propositions are deemed so elementary as to render the citation of authorities unnecessary.

The following instructions were given to the jury by the court on its own motion :

"1st. The plaintiff brings this action in replevin against the defendant to recover the stock of goods which is described in the petition. The plaintiff alleges that on the 1st day of July, 1885, he was the owner of and entitled to the immediate possession of said stock of goods, and that the defendant wrongfully and unjustly detained said stock of goods from the plaintiff for the space of nine (9) days, to the damage of plaintiff in the sum of \$500. The answer of the defendant is a general denial, but he claims that the plaintiff was not the owner of or entitled to the immediate possession of the property replevined. Defendant claims that the plaintiff purchased the goods in controversy from McClintock & Wilson, in fraud of the creditors of said McClintock & Wilson, and that he, defendant, is entitled to the possession of the goods in con-

troversy, by virtue of certain attachments sued out by creditors of McClintock & Wilson in suits against McClintock & Wilson, in which he, defendant, seized the goods in controversy, and these are the issues you are to try and determine.

"2d. The burden of proof is on the plaintiff to show that at the commencement of this action he was entitled to the possession of and was the owner of the goods in controversy, and in order to recover the plaintiff must satisfy you of these facts by a fair preponderance of the testimony.

"3d. The burden of proof is on the defendant to establish fraud.

"4th. It is for the jury to say, from all the facts and circumstances surrounding the transaction between the plaintiff Lucas and McClintock & Wilson in the sale and purchase of the goods in controversy, whether it was bona fide and free from fraudulent intent to hinder, delay, defeat, or defraud the creditors of McClintock & Wilson, or whether it was for fraudulent purpose, and render your verdict accordingly.

"5th. If you find that at the time of the commencement of this action plaintiff was the owner of and entitled to the possession of the property in controversy, then you will so say by your verdict, and assess him nominal damages of one cent for the wrongful detention.

"6th. If you find for the defendant then you will say by your verdict that at the commencement of this action the defendant had a special ownership in and was entitled to the possession of the property in controversy, and also find value of such possession, which will be the total amount of the various attachments held by the sheriff against McClintock & Wilson in favor of the various creditors, amounting to \$4,782.92, unless you find the value of the property to be less than that sum, in which case it will be the value of the property replevined.

"7th. When you have retired to your jury room to deliberate upon your verdict, you will select one of your number as your foreman, and when you have agreed upon your verdict your foreman will sign it, and you will return into court with your verdict in a body."

And the court further instructed the jury, upon the motion and request of the plaintiff below, as follows :

"1st. The plaintiff claims to be the owner of the property in controversy in this action, and claims to have purchased the same on the 18th day of June, 1885, at Creighton, Nebraska, from the firm of McClintock & Wilson, who were then the owners of said stock. It is not disputed that McClintock & Wilson were the owners of the property in controversy at the time of the alleged purchase by plaintiff, but defendant claims that such sale, if made, was fraudulent and void as to creditors, and passes no title to plaintiff as against creditors of McClintock & Wilson. You are instructed that upon the question of fraud in this sale, the burden of proof is upon the defendant, and before the defendant can recover in this action, he must have satisfied you by a fair preponderance of the evidence that the sale of the property in controversy by McClintock & Wilson to said Lucas was made in fraud of the creditors of said McClintock & Wilson, and that the plaintiff, James Lucas, shared in such fraudulent purpose at the time of said sale."

"2d. You are instructed that the sale of property in good faith for a valuable consideration when there is a delivery of the property sold, passes the title to the purchaser, and the fact that the seller was in debt will not of itself invalidate the sale, although the purchaser may have known that fact at the time of the purchase, and the fact that McClintock & Wilson were in debt at the time plaintiff purchased the property in controversy, and plaintiff knew that fact, will not of itself invalidate the sale.

"3d. You are instructed that, although the sale by

McClintock & Wilson to plaintiff may have had the effect to hinder and delay the creditors of McClintock & Wilson in the collection of their debts, this fact alone will not render the sale fraudulent and void. A creditor, however insolvent, may lawfully sell his property, even for less than it is worth, if it is done with a *bona fide* intention of applying the proceeds in discharge of a legal liability.

"4th. A person who is indebted and unable to pay all his debts in full, has a right to prefer any one or more of his creditors to the exclusion of the others, and in payment of a *bona fide* indebtedness to or of his creditors, a debtor may exhaust the whole of his property so as to leave nothing for the other creditors who are equally meritorious, and if you find from the evidence in this case that McClintock & Wilson were indebted to plaintiff at the time of said sale, and that plaintiff for the purpose of protecting himself, and for no other purpose, purchased the stock of goods in controversy, and that such purchase was not made for the purpose of enabling McClintock & Wilson to defraud their creditors, then your verdict will be for plaintiff, and the fact that such purchase prevented other creditors from collecting the amount due them from McClintock & Wilson will not affect the rights of the parties to this suit.

"5th. There is no law requiring a debtor, however insolvent, to keep his property until a creditor can attach it or have it levied upon by an execution. Such a debtor may, in good faith, and for a valuable consideration, sell all his property and apply the proceeds thereof to the payment of any one or more of his creditors, as he may see fit, if done in good faith, although it be done with the intention of defeating his other creditors. And if you find from the evidence that McClintock & Wilson sold the property in controversy in good faith to plaintiff for the *bona fide* purpose of paying a debt then due him from them, and that the balance of the purchase price was paid by plaintiff

to other creditors of said McClintock & Wilson by their direction and in good faith, then you are instructed that such transaction is valid and your verdict will be for plaintiff in this case. And the fact, if it be a fact, that McClintock & Wilson intended by such sale to prevent other creditors from collecting the amount due them will not of itself render such sale fraudulent nor affect the rights of plaintiff in this case.

"6th. You are instructed that a conveyance of property made in good faith to pay an honest debt is not fraudulent, though the debtor be insolvent and the creditor aware at the time of the sale that it will have the effect of defeating other creditors in the collection of their debts. A debtor may lawfully prefer one creditor, paying him in full, thus exhausting his whole property and leaving nothing for his other creditors. A debtor in a failing circumstance has a right to prefer one creditor from another creditor.

"7th. You are instructed that in order to render the bill of sale from McClintock & Wilson to the plaintiff Lucas fraudulent and void as to creditors, the intent to defraud must have existed in the mind of Lucas at the time the transfer was made. Lucas' subsequent conduct in dealing with the property, and his conversation with the witness Fuhrman and others, as given in evidence, will not of themselves render the sale void. Such dealings and conversations can only be considered by you in determining whether or not the intent to defraud creditors existed on the part of plaintiff at the time the sale was made.

"8th. Fraud is never presumed. It must be clearly proven. The law presumes the purchase by plaintiff of the property in controversy in this case to have been an honest purchase and in good faith, and unless you find that defendant by a fair preponderance of the evidence has established the fact that such purchase was made by plaintiff, Lucas, for the fraudulent and dishonest purpose of hindering and delaying the creditors of McClintock & Wilson in

the collection of their claims, your verdict will be for plaintiff. It is not enough to show that the sale to Lucas did prevent other creditors of McClintock & Wilson from collecting their claim. In addition thereto it must be shown that plaintiff made such purchase for the purpose of so hindering and delaying creditors.

"9th. The law presumes that all persons transact their business honestly and in good faith until the contrary appears from a preponderance of the evidence, and the burden of proving fraud is always on the party alleging it. All persons are presumed to be innocent of intentional wrong until they are proven to be guilty, and when an act can as well be attributed to an honest intent and purpose as to a corrupt or unlawful one, then the jury are bound to attribute the act to an honest intent and to a lawful purpose.

"10th. The jury are instructed that when a person purchases goods with the knowledge that his vendor intends by the sale to defraud his creditors, or to hinder and delay them in the collection of their debts, such purchases will not be affected if he takes the goods in good faith in payment of an honest debt. A creditor violates no rule of law when he takes payment of his debt, though he knows that other creditors are thereby deprived of all means of obtaining satisfaction of their own equally meritorious claims.

"11th. The jury is instructed that the possession of personal property is *prima facie* evidence of ownership, if there are no circumstances accompanying the possession to rebut the presumption of ownership; and if the jury believes from the evidence that plaintiff had been in possession of the property in question for some days prior to, and up to the time it was taken from him by the sheriff, and under circumstances indicating ownership in him, then it is incumbent upon the defendant to show by a preponderance of testimony that the title was not in the plaintiff;

and unless he has done so, they should find for the plaintiff as to the ownership of the property.

"12th. You are instructed that if plaintiff purchased the property in controversy in good faith, and without any intent to defraud the creditors of McClintock & Wilson, then the fact that such purchase was made for less than the goods were worth in the market, if such be the fact, will not invalidate the sale, unless the consideration paid was grossly inadequate.

"13th. You are instructed that inadequacy of consideration is not a badge of fraud unless it is great, and the fact that a purchaser buys cheap, or for somewhat less than the market value, will not be sufficient to set aside said purchase, and if you find that Lucas bought said property cheap, or at a low price, that will not invalidate the transfer.

"14th. You are instructed that a conveyance of property by an insolvent debtor with an intent on his part to defraud creditors, made to any person for a valuable consideration, will be valid, unless the purchaser know of such an intent, and the circumstances are such that the payment of the consideration, or the transfer of the property, will enable the debtor to place his property beyond the reach of his creditors, or aid him in so doing, and that no matter what the intention of McClintock & Wilson may have been when the transfer was made, nor how they may have regarded it, if Lucas purchased the stock of goods in good faith, and for a valuable consideration, the conveyance is valid.

"15th. If you believe that any witness, while on the stand testifying before you, has willfully and knowingly testified falsely as to any material matter in issue in this case, you will be justified in disregarding and disbelieving all of the testimony of such witness, except so far as his testimony may be corroborated and substantiated by the testimony of other credible witnesses.

And the defendant below here asked the court to instruct the jury as to the law of the case, as follows:

"1st. The court instructs the jury that fraud in the sale or conveyance of property is a fact that may be proved by showing the existence of other facts and circumstances surrounding, or connected with, the transaction, tending to show a fraudulent intent on the part of the parties to such sale or conveyance, or tending to show a purpose not consistent with an honest intent, and if the jury believe from the evidence in this case, as shown by the proof of facts and circumstances, that McClintock & Wilson intended by the sale of the property in controversy in this action, to hinder, delay, and defraud their creditors, and that plaintiff in purchasing the same participated in, or knew, or had notice of such fraudulent intent on the part of McClintock & Wilson before or at the time he made such purchase, then in such case the defendant is entitled to recover in this action.

"2d. The court instructs the jury that if they believe McClintock & Wilson sold and conveyed the property in controversy to plaintiff, and they further believe from the evidence that McClintock & Wilson intended by such sale to hinder, delay, and defraud their creditors, and that before or at the time plaintiff made such purchase he had knowledge or notice of such fraudulent purpose of McClintock & Wilson, or before or at the time of such purchase the plaintiff had knowledge of such facts and circumstances as would have aroused the suspicion of, and put a reasonably prudent man upon inquiry, which inquiry, if pursued, would have led to knowledge or notice of such fraudulent intent on the part of McClintock & Wilson, then, in such case, plaintiff cannot recover in this action, and they will find for the defendant."

Which said two last above instructions the court gave to the jury as requested by the defendant below.

And the said defendant below further moved and requested the court to instruct the jury as follows:

"3d. The court instructs the jury that if they believe, from the evidence, that McClintock & Wilson sold and conveyed to plaintiff the property in controversy, and that in said sale it was the intent of McClintock & Wilson to hinder, delay, and defraud their creditors, and that plaintiff participated in such fraudulent purpose, or had knowledge or notice of the same before or at the time of the purchase, then in that case plaintiff takes no title to property so purchased as against the creditors of McClintock & Wilson though the jury may believe from the evidence that he paid full value therefor, and in such case the jury will find for the defendant."

But the court refused to give said instruction last above to the jury.

And the court of its own motion modified said instruction last above by the addition thereto, at the bottom thereof, of the following words:

"Unless you further find that plaintiff took the stock of goods in payment of an honest, *bona fide* debt, due him from McClintock & Wilson, without any intention on his part to defraud their creditors."

And after so modifying said instruction, the court gave the same to the jury in such modified form.

And the defendant below further requested the court to instruct the jury as to the law of the case as follows:

"4th. The court instructs the jury that if they believe from the evidence that McClintock & Wilson were insolvent, or were largely indebted, and that they were being pressed by their creditors for payment of their respective claims, and that while so indebted they made sale of all their property to plaintiff, and that such sale had the effect to defeat the creditors of McClintock & Wilson in the collection of their debts, and that such indebtedness of McClintock & Wilson was known to plaintiff before purchasing said property, then these facts, if shown in the evidence, are circumstances to be considered by the jury, showing a fraudulent intent in the sale of such property.

"5th. The court instructs the jury that fraud in the sale and conveyance of property is often difficult to detect and hard to prove, and for this reason the law permits fraudulent purpose and intent to be shown by proof of the existence of other facts and circumstances surrounding or connected with the fraudulent act, that tend to show a dishonest purpose; and in this case, if the jury believe from the evidence that plaintiff was not a merchant or dealer in the character of goods in controversy; that he was a resident of Wisconsin; that he came to Knox county, Nebraska, upon request of McClintock & Wilson, or either of them; that shortly after his arrival he purchased all the property of McClintock and Wilson, at and for a price less than its real value; that prior to such purchase no invoice of said property had been taken whereby the quantity and value could be ascertained; that at the time of such purchase McClintock & Wilson were insolvent or largely indebted; that such sale would have the effect to hinder and delay, if not defeat the creditors of McClintock & Wilson in the collection of their debts; that plaintiff knew of such indebtedness of McClintock & Wilson, or could have known it by ordinary inquiry; that plaintiff disposed of and sold all the property shortly after obtaining possession by virtue of the writ of replevin issued in this action; then these and similar facts and circumstances, if shown in evidence to the jury, are to be considered by them in determining whether the sale of the property in controversy by McClintock & Wilson to plaintiff was fraudulent or not.

"6th. The court instructs the jury that the burden of proving fraud in this case rests upon the defendant. But if the jury believe from the evidence in this case that McClintock & Wilson in the sale of the property in controversy to plaintiff intended thereby to hinder, delay, or defraud their creditors, and they also believe from the evidence that there were facts and circumstances surround-

ing and connected with the transaction of said sale, known to plaintiff, which would put an ordinarily prudent man upon inquiry, which inquiry, if pursued, would give plaintiff notice of the purpose of McClintock & Wilson in making the sale; then in that case the burden of proof is upon the plaintiff to show by evidence that he purchased said property in good faith, for valuable consideration, without notice of any fraudulent intent on the part of McClintock & Wilson.

"7th. The court instructs the jury that if they should find the issues for the defendant in this case then the measure of damages which the defendant will be entitled to recover is the aggregate of the judgments and costs in the case of Henry Fuhrman against G. H. McClintock and G. L. Wilson, and the Friend Brothers Clothing Co. against G. H. McClintock and G. L. Wilson, and Joseph Rice and others against G. H. McClintock and G. L. Wilson, and of the several sums mentioned in the several writs of attachments of Jandt & Tompkins against McClintock & Wilson, and of Straw, Ellsworth & Co. against McClintock & Wilson, and the sums mentioned therein as costs, and not, however, to exceed the value of the goods in controversy."

Which said instructions, numbered 4, 5, 6, and 7 last above, the court gave to the jury as requested by the defendant below.

Other instructions were asked for by the said defendant below and refused by the court, but it is not deemed necessary to set them out at length. Neither is it my purpose to review at length the instructions given or refused. Throughout the series of instructions given at the request of the plaintiff, the jury are told; more or less explicitly, that while the sale of the goods by McClintock & Wilson may have been made with whatever fraudulent intent to hinder, delay, and defraud their creditors, although this fraudulent intent on their part may have been known

to the plaintiff, yet if the purchase on his part was made *bona fide* and solely for the purpose of collecting a debt due him from them, then the sale is good and unaffected by the fraudulent intent of McClintock & Wilson. This is not the law as understood by this court.

In the case of *Temple v. Smith*, 13 Neb., 513, cited by counsel for plaintiff in error, the court, in the opinion of the present chief justice, say: "But where a purchaser has notice of the fraudulent intent of the person from whom he purchases, or has notice of such facts as would put a man of ordinary prudence upon inquiry, which would have led to a knowledge of the fraudulent purpose of the person selling the goods, he is not a *bona fide* purchaser." Citing *Zuver v. Lyons*, 40 Iowa, 510. *Jones v. Hetherington*, 45 Id., 681. *Bradford v. Beyer*, 17 Oh. S., 388. *Brown v. Cutler*, 8 Oh., 142.

It would seem that the provisions of the statute applicable to this subject are too plain to admit of argument.

Section 17, chapter 32, Comp. Stats., 1877, provides that, "Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands or in goods or things in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods, or things in action, or upon the rents and profits thereof, made with the intent to hinder, delay, or defraud creditors or persons of their lawful rights, damages, forfeitures, debts, or demands, and every bond or other evidence of debt given, suit commenced, or decree or judgment suffered with the like intent, as against the person so hindered, delayed, or defrauded, shall be void."

Section 21 provides that, "The provisions of this chapter shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor."

Were it not for section 21, which to that extent modifies

the effect of section 17, a sale made with intent on the part of the vendor to defraud his creditors would be absolutely void, notwithstanding the good faith of the vendee; and so, in order to make the benefits of section 21 available to him, he must have been ignorant, both actually and permissibly, of the fraudulent intent and purpose of his vendor.

The error in the giving of the instructions above referred to on the part of the plaintiff was not cured by the giving of instructions 4, 5, and 6, as asked for by the defendant, where the law is probably correctly stated. For the only effect of said instructions, together with those before given, was to present two inconsistent and conflicting rules of law to the jury without any rule or guide to enable them to distinguish the right from the wrong one. Instruction No. 3, asked for by the defendant, fairly presents the law of the case and should have been given without modification. As modified by the court and given, it was erroneous. While the main question involved in the case was one of fact for the jury, yet to give their finding force and effect upon the rights of the parties they must have been properly instructed in the law of the case. Such not having been done, the verdict cannot be sustained.

The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

ARCHIE G. BROOKS, BY HIS NEXT FRIEND, ELIZABETH BROOKS, PLAINTIFF IN ERROR, V. THE LINCOLN STREET RAILWAY COMPANY, DEFENDANT IN ERROR.

1. **Street Railway: TRAVEL ALONG PUBLIC HIGHWAY: NEGLIGENCE.** It is not negligence *per se* to travel along a public highway by the side of a street railway track on which a car is moving in the same direction as the party traveling, unless such party places himself in such position as to be run over or injured by such street car.
2. ———: **DUTIES OF CAR DRIVERS.** The driver of a horse car on a street railway, in driving horses attached to such car, must sit or stand on the front platform or place provided for him, must maintain control of the horses and car, and exercise a reasonable degree of care and watchfulness to prevent collisions and injury to persons crossing or traveling on or over such street.

ERROR to the district court for Lancaster county. Tried below before CHAPMAN, J.

J. L. Caldwell and *I. W. Lansing*, for plaintiff in error, cited: *Shea v. Portrero and B. V. R. R. Co.*, 44 Cal., 414. *Hugan v. Eighth Avenue R. R.*, 15 N. Y., 380. *Omaha Horse Railway Co. v. Doolittle*, 7 Neb., 481. *Barker v. R. R.*, 4 Daly, 274. *Citizens v. Horse R. R.*, 6 Stewart, 267.

Edward P. Holmes, for defendant in error, cited: *Langhoff v. Milwaukee, etc., R. R. Co.*, 23 Wis., 43. *Murdock v. Finney*, 21 Mo, 138. *Downey v. Hendrie*, 46 Mich., 498. *Hemmingway v. Poucher*, 98 N. Y., 281. *Kussel v. Jzevor*, 2 Bradwell, 245.

MAXWELL, J.

This is an action to recover damages sustained by the plaintiff through the alleged negligence of the defendant.

The plaintiff alleges in his petition, "That plaintiff is

an infant under twenty-one years of age and that this action is brought by his next friend, Elizabeth Brooks, for his benefit; that the defendant on February 19, 1886, was a corporation duly organized under the laws of this state and the owner of a street railroad line with its cars running thereon, and which cars were drawn by horses on and through O street, from Tenth street to Twenty-seventh street, in the city of Lincoln, Lancaster county, Nebraska, and that on said 19th day of February the said plaintiff was traveling on horseback east along said O street, the same being a public highway open and free to all persons to pass and repass at their own free will and pleasure; that at about nine o'clock on the evening of said 19th of February, while plaintiff was thus traveling on said O street, he overtook one of defendant's cars, which was then drawn by horses and in charge of one James Kelley, an agent and servant of defendant; that said car was moving so slowly that the horse on which plaintiff was riding walked by and past defendant's car and horses, and when but a few feet in front of the team attached to said car plaintiff's horse stumbled and fell and plaintiff was thrown to the ground between the tracks or rails of defendant's car line, immediately in front of defendant's horses, without any fault or negligence on his part; that plaintiff uttered a loud outcry and attempted to get up, but was struck by defendant's car and caught by the brakes, machinery, and projections thereof, and was rolled, crushed, and dragged under said car about forty or fifty yards, and was stripped of his clothing, and was run upon and over by defendant's car, bruising and wounding plaintiff's legs, arms, body, and face, and rendering him sick, sore, and lame, and causing him to suffer severe bodily pain and anguish, and leaving him unable to pursue his ordinary work as telegraph operator and linesman, or any work whatever, so that he has been and will be obliged to expend large sums of money, to-wit, two hundred dollars for medical aid and

medicines, nursing, and care, to be relieved of the consequent pain and suffering; that said accident and injuries were caused wholly and solely by the culpable and inexcusable negligence of the defendant, its agents, and servants, in not attempting to stay said car or direct or stop the horses attached to the same or apply the brakes to said car, and in absolutely refusing and neglecting to do any act whatever to avoid or lessen said accident and injuries; that no act on the part of the plaintiff contributed in any degree to produce or cause the said accident and injuries, but the same were caused entirely and only by the negligence of defendant, its agents, and servants."

The defendant, in its answer, in substance denies that the accident happened through fault, negligence, or carelessness on its part, but solely from the recklessness and carelessness of the plaintiff.

The testimony tends to show that the plaintiff was a telegraph operator, the office being at the corner of O and Tenth streets, in the city of Lincoln; that he resided with his mother at the corner of Twenty-fourth and O streets, in said city; that a little before nine o'clock at night on the 19th of February, 1886, he left the telegraph office to go home; that he had a pony which he was accustomed to ride to and from his home, and on the night in question he rode east along O street on the north side of the street railway track; that the street was somewhat rough and the principal travel of teams and wagons passing along said street was on the north side of the track and some three or four feet from the same; the plaintiff, in riding along said street, was on the south side of the usually traveled track and about three or four feet north of the street railway. At about the corner of Twenty-third and O streets the plaintiff overtook the street car going east. He testifies: "I rode by the car, my pony was walking, and the street car horses were walking very slow, hardly moving it looked like to me, and when I had passed them,

I guess about ten feet, my horse stepped into a hole, apparently, and fell south, throwing me on to the track, over onto the street car track ; and it seemed to me the horse was not in any hurry getting up and held me there until the street car horses was on each side of me and I couldn't get out, and the car passed over me and mangled me up under the car, and I caught under the car and dragged I guess for fifty or a hundred feet on the hard frozen ground in the middle of the track, and somebody picked me up and took me home or put me in the car."

This testimony is not denied except as to the distance the plaintiff was dragged. The testimony of Kelley, the driver, as to the accident is as follows:

Q. Where were you when you first saw Brooks on the track?

A. I was on the front platform, outside the door. I can tell you how the whole thing was, if I can go on word by word.

Q. Go on word by word and tell how the whole thing was?

A. No. seven passed me on the switch, and after he he got by me I wanted to tell him not to make another trip but to go to the barn, that I had made his trip, for my trip was an extra trip. I leaned around the car, stuck my head around the car after he had got past me quite away, and I whistled to make him stop. I forgot to tell him when he passed me, and while leaning around there whistling and trying to make him stop I saw a horse and man coming towards me, coming from the west ; when I whistled I thought I heard this man that was on horseback whistle and try to make him stop ; when I saw that I couldn't make him stop I tied my lines to the front dash, I stepped in the car, closed the door, and fixed a poultice that was on my neck, pulled it up and fixed it ; it was on a boil on my neck. I saw the old lady that was on the car look out, when it attracted my attention, and I looked out, and

saw a man going by on horseback. I stepped out on the front platform, turned my back to the north, picked my lines up off the dash, straightened up. Just then I saw this man's pony slip. His pony fell about half way, just stepped to the side and caught itself, and throwed him into the center of the track. That scared my horses and they stopped stone still before I could catch the brake. The car run upon the horses and scared them, and they gave a lunge, and before I could catch the brake the car run upon the horses. There was mud and dirt on the brake shoes. When I had my brake set and throwed all my force on it the mare on the left side kicked and I had to let the brake go. When I got the brake and set it the car was then sliding from the force the horses gave it. It was then in pretty good motion. The mare kicked again and kicked the dash when the car passed over him. I stopped the car as soon as I could. I got off the car to where he was laying in the middle of the track. He wasn't laying, he was on his hands and knees. I asked him what was the matter, and he says for God's sake, Kelley, take me to mother. I asked him where his home was, and he pointed up north-east from where he was, and says up there. By this time Mr. Barrett, the old man that was in the car, and that man that run the second hand store, and a man that lives across the street, I think in a little red house, they were there, they helped me put him on the car and I drove the car up on to the Antelope bridge.

The witness then testifies that he carried the plaintiff to the house of his mother. On cross-examination he said: "I think his mother was the first that came to the door and she says, I think these are the words she repeated, 'Oh, my God, is the boy killed?' I did not know how bad the boy was hurt, I said to some one there that was going to tell her, don't you tell her; she asked me what was the matter with the boy, or how did he get hurt, and I told her that I did not know. I did not want to tell her the truth because she was so badly excited then."

Q. Did you have any further conversation with her on that night.

A. Yes, sir.

Q. State what it was?

A. I carried the boy in and put him on the lounge and went down to my car. I left the car just on the other side of the Antelope, put up my lines, put on the brakes, and I went up to see how the boy was. His mother was there, and his brother, Charlie Brooks; his mother says to me, "It is all your fault." I told her that I could not help it. Charlie Brooks says to me, "If you had have pulled up the lines, stopped the car, it would never have happened." "Well," I says, "that is all right, Charlie. stopping a car is a great deal different than stopping a wagon; you can stop a wagon by pulling up the lines, but you can't stop a street car that way." I left the house, went down to the car, drove up to the barn on 10th and A.

Q. Did you not, on February 19th, 1886, at Mrs. Brooks' house in this city, in the presence of Maggie Brooks, Charlie Brooks, Oscar Chase, and a man named Clusman, say in reply to Mrs. Brooks, "Do you think I did it on purpose? If I had been out by the brake it would not have happened. I was inside talking to a man and did not know it," or in substance words like these?

A. No, I did not.

Q. State if there is any other thing or fact in relation to this accident that you have not fully explained?

A. This is all I remember.

An effort was made on behalf of the railway company to have the testimony of Kelley, as to his admissions to Chase and others, stricken out and excluded, which was overruled.

The plaintiff called O. J. Chase, who testified that Kelley, on the night of the injury, said, when interrogated as to the cause of the accident: "I was in the car. If I had been outside I could have warded this accident off."

In this testimony Chase is corroborated by the mother of the plaintiff, and a brother and sister.

One John H. Barrett was called as a witness by the railway company, who testified in regard to the accident as follows: "After we passed the switch the horses slackened up and the driver just stepped inside of the car and said he had a sore or something troubling him on his neck, and he unfolded a muffler and twisted it about his neck; I noticed he bent forward considerably, and he stood there at the door; all at once he sprang out from the door on to the platform, jumped at the brakes, and almost at that moment there was a jostling and I jumped up and stepped out, and he stepped off and ran around, and I followed him around. I supposed he was off the track. As I followed him around I saw a man lying on the track a little distance back, and I ran to him and he was groaning badly, and said his legs were both broken, and within a moment or two the driver took hold around his chest and I took hold of his legs and we took him in the car and laid him out on the seat."

There is other testimony in the record to which it is unnecessary to refer.

On the trial of the cause the court instructed the jury as follows: "You are instructed that if the injury complained of was occasioned by the negligence of plaintiff in riding upon or along the side of the railroad track of the defendant, when said horse car of defendant was in motion, and that plaintiff, being thrown upon said track without fault of defendant, was run over unavoidably by defendant, and without fault of defendant and its servants in charge and control of said horse car, then your verdict should be in favor of the defendant, for if the plaintiff contributed to the accident by carelessness or negligence, and was unavoidably injured by defendant and its servants in the ordinary course of defendant's business in running and operating said horse car, then in such case he could not

recover against the defendant." This was excepted to and the giving of the same is now assigned for error.

It is not negligence *per se* to travel along a public highway by the side of a street railway track on which a car is moving in the same direction as the party traveling, unless such party places himself in such position as to be run over or injured by such street car. The jury were left to infer, however, by the instruction given, that if the injury was occasioned by the plaintiff riding along the railroad track when the car was in motion, he could not recover. The question of negligence was one of fact for the jury to determine from the testimony, and the effect of the instruction was practically to withdraw that question from the jury. The court, therefore, erred in giving the same.

The plaintiff asked the court to give the following instruction: "The court further instructs the jury that it was the duty and incumbent upon the driver of the defendant's car to stand on the front platform, with the lines from the horses drawing the car in his hands, and to exercise a reasonable degree of care and watchfulness to prevent all collisions and injury to persons crossing and traveling on and over said street. And if you believe from the evidence that the injury in this case was caused by the want of the driver remaining on the front platform, ceasing to have and hold the lines in a careful manner, his failure to watch carefully or in any manner use reasonable care to prevent the injury, and that for any of said reasons the injury occurred, then the defendants are liable, and you will find for the plaintiff and assess the damage at such sum as from all the evidence you believe he has sustained, unless you further find from the evidence plaintiff might by the exercise of ordinary care have avoided the consequences of defendant's negligence," which the court refused, to which the plaintiff excepted.

This instruction should have been given. It is the duty of the driver of a street car to sit or stand on the front

platform, or such place as may be provided for him, with the lines of the horses drawing the car in his hands, and to exercise a reasonable degree of care and watchfulness to prevent collisions or injury to persons traveling on said street. A street is a public thoroughfare where all may pass and repass at pleasure, each having due respect for the rights and safety of others. There is testimony from which the jury would have been warranted in finding that the driver was not at his post of duty when the accident occurred, that he was inside of the car, and upon observing the accident rushed out and endeavored to stop the car, when, had he been at his post, he could have done so before the car passed over the plaintiff. While a street railway company has a right to operate its lines of railway in the streets of a city, and to have precedence over other vehicles on its right of way, yet these rights must be exercised with due regard to the rights of others, and not in such a manner as wantonly or negligently to cause injury to persons lawfully crossing or traveling on said street.

The judgment of the court below having been for the defendant, it follows that such judgment must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

WILLIAM B. THORNE, PLAINTIFF IN ERROR, V. ADAMS
COUNTY, DEFENDANT IN ERROR.

1. **County Treasurer: DEFAULT IN PUBLIC FUNDS: ACTION BY COUNTY.** Where a county treasurer is in default in respect to the county, state, school district, precinct bond, city, and other funds, and his bond has been canceled and bondsmen discharged by a judgment of the district court of the proper county, an action will lie against him in the name of the proper county for all such funds in respect to which he is a defaulter.
2. ———: ———: ———. In such case the county proceeds under a form analogous to that of a trustee of an express trust, in respect to all of such funds other than those of the county proper.

ERROR to the district court for Adams county. Tried below before MORRIS, J.

Dilworth, Smith & Dilworth, for plaintiff in error, cited: Sec. 29, Civil Code. *Albertson v. State*, 9 Neb., 429. *Hunter v. Commissioners*, 10 Ohio State, 519.

Charles H. Tanner, for defendant in error, cited: Sec. 32, Civil Code. *Pomeroy Remedies*, Secs. 171, 179. *Peel v. Elliot*, 7 Abb. Pr., 433. *Albertson v. State*, 9 Neb., 429.

COBB, J.

There is but one controversy presented by the record and briefs of counsel in this case, and that is, whether in a case where a county treasurer has become a defaulter in respect to the several funds—county, state, school district, and other funds—which it is his duty to collect and pay over to the persons and corporations entitled thereto, an action can be maintained against him for all of said funds for the payment of which such county treasurer is in de-

fault, by and in the name of the proper county. It seems to be admitted that where there is a subsisting bond given by such county treasurer, with securities in accordance with the provisions of the statute, such action may be maintained on such bond against the county treasurer and his securities for all funds of which he is in default. But in the case at bar the action is against the treasurer alone upon his legal liability.

Counsel for plaintiff in error contend that the plaintiff in the court below, the county of Adams, can only recover for the county funds proper, which the defendant collected and failed to pay over, and they cite section 29 of the code in support of that proposition.

Section 29 provides that, "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section thirty-two," which section provides that, "An executor, administrator, guardian, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued in such name as is authorized by law, and official bonds may be sued upon the same way."

Counsel for defendant in error contend that the case at bar comes within the exception, that the county is the trustee of an express trust in respect to the state, school district, and other taxes than the county taxes, which it is the duty of the county treasurer to collect and pay over in accordance with the several provisions of statute applicable thereto.

While the county holds a relation to the state and other *quasi* corporations in respect to the levy and collection of taxes somewhat analogous to that of trustee of an express trust, I cannot conceive that it holds exactly that relationship, or that either state or county, or the powers and du-

ties of either in respect to the other, were in the minds of the framers of the code when they adopted the language of section thirty-two.

Ordinarily the official bond of the county treasurer not only furnishes a security to all persons and corporations interested, but by its terms points out who must be the plaintiff in a suit brought thereon. As the law provides that a sufficient bond shall be taken in every case, and does not provide for the cancellation or withdrawal of such bond until it has served its purpose, in any case, it is improbable that any action other than one upon such bond was contemplated by the legislature. And yet, it appears by the record in the case at bar that the bonds given by the defendant (for there were two of them) were canceled by judgment of the court without their having served the purpose for which they were given. And the defendant still being in default in respect to the state general fund, the state sinking fund, the school fund, the state university fund, the state penitentiary fund, the state bond fund, the state insane hospital fund, the state school land interest fund, the state school land lease fund, the Juniata precinct bond fund, the school district fund, the Denver precinct bond fund, the school district bond fund, the district school judgment fund, the city of Hastings tax fund, the village of Juniata tax fund, the fund levied against school district No. 21 to pay school district No. 42, and the tax sale redemption fund, unless suit can be maintained therefor in the name of the county, it is apparent that there must be numerous actions brought against the defendant or there will be a failure of remedy, and of justice.

If it be conceded that an action would lie in the name of the state, for the state funds, and in the names, severally, of the city of Hastings, and the village of Juniata for the funds due them, there would remain the Juniata precinct bond fund, the school district fund, the Denver precinct bond fund, the district school judgment fund, and the fund

levied against school district No. 21 to pay school district 42, part or all of which it is believed can not be collected properly by any party other than the county, for the want of capacity in the real party in interest to sue. It is a serious objection to the view taken by counsel for plaintiff in error, that it would entail the bringing of a great multiplicity of actions with a corresponding increase of costs. And I will add that should the example set in the cases shown in the record, of canceling the bonds of the county treasurer and discharging the securities, be followed in other cases, and become general throughout the state, and it should be held that the state was thereby relegated to its own action to recover the state taxes, it would entail an amount of labor upon the law officer of the state not contemplated by law, and which, added to his other duties, would become too burdensome for successful administration. It may safely be said not to be the policy of the state to assume the burden of such litigation, but that by long usage, if not by positive law, the same has been relegated to the respective counties, by which, I think, by virtue of a power quite analogous to that of a trustee of an express trust, the same may be prosecuted.

I have carefully examined the case of *Albertson v. The State*, 9 Neb., 429, cited by counsel for plaintiff in error, but do not find it an authority against the conclusion reached in this case.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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5. Not necessary to obtain review of judgment sustaining demurrer to petition in equity. *Hays v. Mercier*..... 656

Bonds—Official and Statutory. See LIMITATION OF ACTION. PRINCIPAL AND SURETY.

Bonds—Municipal.

1. May be issued by cities of second class for sewer purposes. *State v. Babcock* 614
2. Bonds issued by a county as a donation to a railroad company are invalid unless they have endorsed thereon a certificate, signed by the secretary and auditor of state, showing that they were issued pursuant to law. *State v. Roggen*..... 118

Burglary.

1. Where party hears of intended crime, does not prevent it, but effects capture of burglar, this does not affect guilt of burglar. *State v. Sneff*..... 481
2. A person promising to act as accomplice is competent witness to prove declarations and acts of party committing the offense. *Id.*..... 481
3. If evidence would warrant jury in finding party guilty, it is error for the court to direct acquittal. *Id.*..... 481

Cities of Metropolitan Class.

Appointment of board of fire and police commissioners by governor not repugnant to constitution; appointment of chief of police by said board sustained. *State, ex rel. Sim-
eral, v. Seavey*..... 454

Cities of Second Class.

Power to construct sewers, etc., carries authority to issue sewer bonds. *State v. Babcock*..... 614

Claims. See CONSTITUTIONAL LAW.**Commissions to Real Estate Agent.**

Where a real estate broker brought action to recover commissions for a completed sale of real estate, and testimony showed that he had merely procured a purchaser, who afterwards purchased such real estate from the owner, *Held*, That the action was one to recover upon a *quantum meruit*—the value of the services rendered, but as no objection had been made to the testimony, the judgment will be sustained. *Held*, Also, that a judgment awarding the broker a less sum than the commission upon a completed sale will not be set aside. *Gregg v. Loomis*..... 174

Consideration.

1. Mortgage by co-surety to another to secure him against a contingent liability as surety is not without consideration. *Sparks v. Wilson*..... 113
2. The guaranty of L. to pay the note of D., in consequence of which one B. delivered certain personal property to D., *Held*, Sufficient consideration. *Lamb v. Briggs*..... 139

Constitutional Law.

1. Fiscal year; legislative appropriations. *State v. Babcock* 33
2. Legislature has no power to audit or adjust claims against state; duty of auditor and secretary of state. *State v. Babcock*..... 39
3. Claims against state must be examined by auditor and approved by secretary of state before warrant can be drawn. *State v. Babcock*..... 38
4. The insertion of the words "or damaged" in section 21, Art. I., was intended to give a right of recovery which did not previously exist, and was not intended to limit or restrict any remedy previously existing. *O. & R. V. R. R. Co. v. Standen*..... 343
5. Governor has power to appoint board of fire and police commissioners in cities of metropolitan class. *State, ex rel. Simcral, v. Seavey*..... 454
6. Act of March, 1855, defining boundaries of Blackbird county, *Held*, Inoperative and void as being in violation of organic act of territory of Nebraska. *State, ex rel. Peoples, v. Thayer*..... 413
7. Act of 1897 (Comp. Stat., Ch. 36a) requiring registration of voters in cities of metropolitan and first class, *Held*, Void. *State, ex rel. Stearns, v. Corner*..... 265

Continuance.

1. Under facts stated, *Held*, That district court erred in not granting continuance. *Newman v. State*..... 355
2. Counter affidavits not proper. *Id* 357
3. Discretion of court, not interfered with, unless abused. *Singer Mfg. Co. v. McAllister Bros*..... 359
4. Where affidavit shows absence of necessary document, it should affirmatively appear that diligence has been used to procure it, and that it is probable it can be had, in case continuance is granted. *Id*..... 359

Contract.

1. Relative to purchase of cattle; case stated, and plaintiff allowed to rescind and recover back money paid. *Dakota Stock Co. v. Price*..... 96
2. In action of rescission, conduct of parties in reference to subject-matter may be considered. *Dakota Stock Co. v. Price*..... 108
3. Verbal contract upon sufficient consideration, by which owner of personal property gives a lien upon it is valid. *Sparks v. Wilson*..... 112
4. Action to set aside contract in reference to the handling and investment of certain funds of plaintiff; evidence ex-

- amined, and *Held*, Not to present a case of fraud or undue influence. *Holmes v. Hill*..... 425
5. Verbal evidence inadmissible as to what passed between parties either before the written instrument was made or during the time of its preparation, so as to add to or subtract from or in any manner to vary or qualify the written contract. But after it has been reduced to writing, it is competent for the parties, at any time before breach of it, by a new contract, not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary or qualify the terms of it; which is to be proved partly by the written agreement and partly by the subsequent verbal terms. engrafted upon what will be thus left of the written agreement. *Idaney v. Linder*..... 274
6. Allegation of mistake or failure to truly express terms of contract, with prayer for its reformation, necessary in pleading as foundation for admission of evidence to vary its terms. *Id*..... 280
- Corporations—Municipal.** See **CITIES.**
- Costs.**
- Should be taxed separately; if not so done supreme court will remand for that purpose. *Cooper and Co. v. Hall*..... 171
Wallace v. Flieschman 203
 - Motion to re-tax must be made in trial court before judgment will be reviewed in supreme. *Wilkinson v. Carter*... 186
- Counties.**
- Jurisdiction of county board in establishment of ditches and drains under Ch. 89, Comp. Stat. *County of Dakota v. Cheney*..... 437
 - Act of March, 1855, defining boundaries of Blackbird county, *Held*, Void. *State, ex rel. Peoples, v. Thayer*..... 413
 - Where an account has been duly allowed against a county in a case where the county board has jurisdiction, it is the duty of such board to include the same in its estimates of the taxes to be levied for the ensuing year, and if it fails to do so it may be compelled by mandamus to perform its duty. *State, ex rel. Clarke, v. Cather*..... 792
 - County may bring action against defaulting treasurer for all funds in respect to which he is a defaulter. *Thorne v. Adams County*..... 825
- Courts—District.**
- Terms of court, effect of adjournment from first day to subsequent day, on appeals taken from justice of peace. *Clapp v. Bowman & Ware*..... 202

Court—Supreme.

1. In a case brought on error to a district court, to reverse a judgment of that court reversing a judgment of a justice of the peace, and upon examining the petition in error to said justice of the peace and the record certified by him, it appears that there is reversible error assigned, it will be presumed by this court that it was upon such errors that the judgment of the justice was reversed, and not upon other errors assigned, which are believed not to be reversible. *Stanton & Co. v. Spence*..... 191
2. Has jurisdiction in mandamus against railroad company to compel it to comply with orders of state board of transportation. *State v. F., E. & M. V. R. R. Co*..... 315
3. Motion to dismiss sustained, no transcript having been filed, although petition in error was filed and summons issued. *Sturtevant v. Wineland*..... 702

Creditor's Bill.

1. Insolvency of grantor will not of itself render conveyance to creditor, upon adequate consideration, fraudulent and void. *Joiner v. Van Alstyne*..... 172
2. Where insolvent debtor has made assignment of his property, the proceeds of which have been distributed among creditors, leaving a large amount unpaid, a creditor's bill filed by the assignee, or a creditor who has proved his claim, will inure to the benefit of all creditors who have established their claims against said assigned property. *Fisher v. Herron. Bogart v. Fisher*..... 183

Criminal Law.

1. If grand jury examine case against a party bound over to await its action, and report "no cause of action," subsequent information by prosecuting attorney for same offense on same evidence is invalid and accused entitled to be released. *Richards v. State*..... 145
2. Where charge in preliminary examination is substantially the same as that set forth in information, plea of want of preliminary examination unavailing. *Cowan v State*..... 519
3. Question of want of preliminary examination should be raised by plea in abatement. *Id*..... 519
4. Where record of indictment has been omitted or lost or destroyed, court will receive secondary evidence as to the essential facts stated in it which conferred jurisdiction on trial court. *Ex parte Carr*..... 535
5. Accomplice competent witness to prove declarations and acts of party committing offense. *State v. Sneff*..... 481
6. Except in cases where it is necessary to show guilty knowledge, it is not admissible to prove that at another

- time and place accused committed or attempted to commit a crime similar to that with which he stands charged. *Cowan v. State*..... 520
7. The court, in defining reasonable doubt, said: "It is a doubt for having which the jury can give a reason, based upon the testimony." *Held*, Erroneous and calculated to mislead. *Id*..... 520
8. Under R. S., 1866, where a murder was alleged to have been committed in county of Sioux, party accused of committing same could be indicted and tried in Cheyenne county, it being directly south of Sioux county. *Ex parte Carr*..... 535
9. Upon trial in the district court, testimony was introduced tending to establish all the material allegations of the complaint. Upon the close of the state's testimony, defendant moved the court that the cause be dismissed and the defendant discharged, which motion was sustained. *Held* Error, there being evidence of guilt which should have been submitted to jury. *State v. Kellner*..... 668
10. Evidence in case of complaint for keeping false weights. *Id*..... 668
11. Evidence in case of obtaining property by false pretenses. *Prehm v. State*..... 673

Damages.

1. Measure of, caused by obstructing water course and causing injury to adjacent land—stated. *Stewart v. Schneider*, 290
2. Continuing nuisance: damages limited to what may have accrued before action brought. *O. & E. V. R. R. Co. v. Standen*..... 343
3. False representations in sale of real estate: measure of damages is difference in value between property as represented and as it actually is. *Woolman v. Wirtsbaugh*..... 490
4. Measure of in case of fraudulent representations and concealment of indebtedness in case stated. *Forbes v. Thomas*.. 541
5. Action on note; satisfaction by conveyance of property; defect of title; measure of damages is amount of incumbrances or value of property. *Downie v. Ladd*..... 531
6. Setting out prairie fire; negligence question for jury. *Powers v. Craig*..... 621
7. In cases of slander. *Brooks v. Dutcher*..... 644

Debtor and Creditor.

- Creditor may obtain from failing debtor payment of his claim, provided he acts in good faith and receives no more than sufficient to satisfy the debt. *Rothell v. Grimes*..... 526

Deed.

1. Where the evidence as to the delivery of a deed is conflicting and nearly equally balanced, and the court below found in favor of delivery, such finding will not be set aside as being against the weight of evidence. *Smith v. Mesarvey*..... 756
2. Where a vendor had executed a bond for a deed, two-thirds of the purchase money being still unpaid, and afterwards delivered a deed to an attorney upon his assurance that if the deed was delivered to the grantee, he would either pay or secure the purchase price to said vendor, *Held*, That as the vendor, prior to the delivery of the deed, had a lien upon the premises for the unpaid purchase money, which lien was divested by the absolute delivery of the deed by the attorney to the grantee, that therefore the equity of the vendor was superior to that of the attorney for services rendered the grantee, and a mortgage taken by such attorney to secure his fees would be postponed to the claim of the vendor for the unpaid purchase money. *Id.*..... 756

Definitions.

1. Word "all" includes the whole. *State v. Babcock*..... 37
2. "Sufficient" means reasonable in contract referring to "sufficient time." *Sandwich Mfg. Co. v. Feary*..... 67
3. "Keeping" as used in chattel mortgage means keeping the property after taking by mortgagee and pending its advertisement and sale. *State Bank of Nebraska v. Lowe*... 72
4. "School." *Omaha Medical College v. Rush*..... 453

Delivery. See DEED.

Demurrer.

- Lies, if face of petition shows action barred. *Merriam v. Miller*..... 218

Depositions.

- May be taken by notary in office of attorney interested in taking. *Singer Mfg. Co. v. McAllister Bros*..... 359

Discretion of Court.

- Trial of causes. *Connell v. Chambers*..... 305
In questioning witnesses at *nisi prius*. *Fager v. State*..... 332

Dismissal of Action.

1. Under section 430 of code plaintiff cannot as a matter of right dismiss action after final submission. *State v. Scott* 628
2. Where a cause was submitted to supreme court on demurrer to petition and a decision rendered sustaining demurrer, but no opinion filed, and afterwards and before the preparation of opinion plaintiff attempted to dismiss

the action, to which defendant objected, *Held*, That attempt to dismiss was unavailing, and that the cause having been finally submitted final judgment in the case would be rendered. *Id.*..... 628

Ditches and Drains. See SWAMP LANDS.

Divorce and Alimony.

1. Fraudulent settlement of case by parties whereby attorney is deprived of his lien for fees set aside and amount found due ordered paid in court by defendant. *Aspinwall v. Sabin*..... 74
2. Original plaintiff not necessary party to motion by attorney to set aside settlement of case on ground of fraud. *Id.*..... 74

Ejectment.

In case stated, *Held*, That plaintiff had not shown title to land in question, and judgment affirmed. *Methodist Protestant Church v. Johnson* 163

Elections.

Registration law (Comp. Stat., Ch. 26a) passed in 1887, *Held*, Void, *State, ex rel. Stearns, v. Corner*..... 285

Eminent Domain.

Right of, can not be exercised by foreign corporation unless organized under the laws of this state. *State v. Scott*..... 628

Error.

Must be prejudicial. *Pollard v. Turner*..... 368
Brooks v. Dutcher..... 644

Estoppel.

Mortgagor of live stock estopped to reclaim stock from one with whom he has contracted for their feed and care until he has paid or tendered pay therefor; and mortgagee equally estopped if in privity with mortgagor. *State Bank of Nebraska v. Lowe*..... 72

Evidence.

1. Testimony of expert as to value of property not inadmissible because he has not seen it since about a month prior to time when value was to be established; it being shown by other testimony that the property was in substantially the same condition at both periods of time. *Connelly v. Edgerton*..... 82
2. Testimony of expert as to value of property, based upon what he would give for it, properly admitted, though unexplained might tend to diminish the weight of his testimony. *Connel y v. Edgerton*..... 83

3. Account books. <i>Pollard v. Turner</i>	366
<i>Holland v. Commercial Bank</i>	571
<i>Campbell v. Holland</i>	583
4. Admission of articles of incorporation of bank, in case stated, <i>Held</i> , Proper. <i>Holland v. Commercial Bank</i>	571
5. Declaration of vendor in case stated. <i>Campbell v. Holland</i>	587
Intent in cases of fraud. <i>Id.</i>	588
6. In action by payee against guarantor of note. <i>Lamb v. Briggs</i>	139
7. Admission of part of stipulation of facts, without admitting entire stipulation, not error in case stated. <i>Pollard v. Turner</i>	369
8. Presumption as to verdict. <i>Cooper & Co. v. Hall</i>	168
9. Presumption that plaintiff assents to judgment confessed by defendant before justice of peace. <i>Flanagan v. Continental Insurance Co</i>	235
10. In cases of rape. <i>Fager v. State</i>	332
11. Admission of improper testimony must be objected to at the time. <i>Id.</i>	332
12. Action for work and labor; burden of proof on plaintiff. <i>Driscoll v. Troughton</i>	265
13. Burden of proof on defendant admitting purchase, but alleging failure of warranty. <i>Cooper & Co. v. Hall</i>	169
14. In case stated examined and <i>Held</i> , Not to present a case of fraud or undue influence. <i>Holmes v. Hill</i>	425
15. General reputation of a party to an action cannot be established by the proof of specific acts. <i>Dorsey v. Clapp</i> ..	564
<i>Brooks v. Dutcher</i>	644
16. In cases of malicious prosecution. <i>Dorsey v. Clapp</i>	564
17. In cases of slander. <i>Brooks v. Dutcher</i>	644
18. In case where general reputation of party for chastity is involved. <i>Id.</i>	644
19. Whenever part of conversation is drawn from witness adverse party may examine as to whole of conversation. <i>Campbell v. Holland</i>	588
20. Plaintiff was cross-examined as to source from which he derived money used in purchase of property in litigation, and having answered that a certain portion of it had been received by him in payment of a loan previously made to his father, an attempt being made, as well in his further cross-examination as otherwise, to discredit his statement in this behalf, he was permitted to testify in rebuttal as to where he obtained the funds out of which said loan was made. <i>Held</i> , No error. <i>Id.</i>	588
21. Parol, admissible to show that date following entry of judgment relates to the time of such entry on the docket. <i>Wilkinson v. Carter</i>	186

22. Parol, admissible to explain writing on draft. *Cortelyou v. Maben*..... 697
23. A witness on his examination-in-chief, or re-examination by the party calling him, when on account of his possessing special knowledge, skill, or experience, is permitted to give his opinions or judgment on a question of quality or values, if he is permitted to give the source of his special knowledge, experience, or skill, it will be confined to general statements. And when he is permitted to narrate the facts and circumstances of a special transaction, outside of the case on trial, for the purpose of enabling the jury to compare the facts and results of such transaction with those of the case on trial, and in that manner impress them with the soundness of his opinion or judgment; *Held, Error. Bollman v. Lucas*..... 796

Exemption.

1. The wages of a laborer—who is the head of a family—earned within sixty days prior to the service of garnishee process, are not liable to garnishment in the hands of his employer for the satisfaction of a debt for the wages of another laborer. *Snyder v. Brune*..... 189
2. Property used by Omaha Medical College exempt from taxation. *Omaha Medical College v. Rush*..... 449
3. Money which is absolutely exempt, such as the wages of laborers who are heads of families, for sixty days, not subject to fraudulent alienation, and the fact that such wages are exempt is a complete defense to any proceeding to apply them to the payment of a judgment against the debtor. *U. P. R. R. Co. v. Smersh*..... 751
Id...... 751
4. Pleading in garnishment. *Id.*..... 751

False Imprisonment.

- Petition in action against sheriff examined and *Held, Good.*
Berrer v. Moorhead..... 687

False Pretenses.

1. Information filed for obtaining personal property of another by false pretenses, which pretenses were alleged to be the representation that "five certain worthless drafts were each worth the sum of \$100," etc. Upon trial the instrument was introduced in evidence and admitted. This instrument was not a draft, its character being shown by copy set out in opinion. It was held to have been improperly admitted, and that there was a variance between the allegation of the information and the proof. *Prehm v. State*..... 673
2. Where information for obtaining money by false pre-

tenses alleges that, "by reason of the false pretenses," accused obtained the money, the words of the statute being, "by false pretense," <i>Held</i> , The allegation was sufficient. <i>Cowan v. State</i>	519
3. Where money was obtained from bank, note and mortgage given to secure same are sufficient evidence to prove <i>de facto</i> existence of bank. <i>Cowan v. State</i>	520
<i>Holland v. Commercial Bank</i>	571
False Representation.	
In sale of real estate; duty of court to instruct jury as to particular damages; measure of damages. <i>Woolman v. Wirtsbaugh</i>	490
False Weights and Measures.	
Complaint for reporting false weights, etc; evidence examined and held admissible. <i>State v. Kellner</i>	668
Fiscal Year.	
Commences on the first day of December. <i>State, ex rel. Bullock Mfg. Co., v. Babcock</i>	33
Forcible Entry and Detention.	
1. Action does not lie if party is in possession of real estate under contract of purchase. <i>Worthington v. Woods</i>	230
2. Sufficient to sustain charge that party unlawfully in possession refuses to vacate premises on lawful notice so to do. <i>Esterbrook v. Hateroth</i>	281
3. Notice to quit, dated and served on tenant thirteen days or more before termination of lease, and while it was in full force and effect, by terms of which notice tenant was required to quit, surrender, and deliver up possession forthwith; <i>Held</i> , Insufficient. <i>Connell v. Chambers</i>	302
Fraud.	
1. Question of intent one of fact. <i>Connelly v. Edgerton</i>	82
<i>Davis v. Scott</i>	154
2. Facts stated in a case involving purchase of property by plaintiff's agent, fraudulent transfer, etc.; testimony conflicting; decree of district court in favor of defendants affirmed. <i>Holmes v. Shimer</i>	207
3. A good defense to action on foreign judgment if properly pleaded. <i>Keeler v. Elston</i>	310
4. Allegations of, in case stated, <i>Held</i> , Not sustained by the evidence. <i>Holmes v. Hill</i>	425
5. Insolvency of mortgagor, although a circumstance which may be taken, together with other facts, to show a fraudulent design in disposing of property, is not of itself sufficient to establish it. <i>Rothell v. Grimes</i>	526
6. Fraudulent representations and concealment in case	

- stated; effect of discharge in bankruptcy stated; measure of damages; error without prejudice; limitation of action. *Forbes v. Thomas*..... 541
7. Evidence of assignor, vendor, assignee, or purchaser, admissible to show intent. *Campbell v. Holland*..... 589
8. To avoid a sale on the ground that it is fraudulent as to creditors, the purchaser must have knowledge of the fraudulent purpose of the seller, or have notice of such facts tending to show a fraudulent purpose as would put a man of ordinary prudence on inquiry. *Bollman v. Lucas*..... 796

Fraudulent Transfer of Property.

Transactions between relatives, whereby property is transferred from one to another in payment of an alleged past due indebtedness, by reason of which creditors are deprived of their just dues, will be scrutinized very closely, and the *bona fides* of such transaction must be clearly established. *Fisher v. Herron. Bogart v. Fisher*..... 183

Garnishment.

1. While an order made by a court in a proceeding in garnishment after judgment cannot be attacked collaterally, yet the garnishee afterwards may set up facts showing the amount owing by such garnishee to the debtor to be exempt from attachment or execution. *U. P. R. E. Co. v. Smersh*..... 751
2. While the statute in proceedings in garnishment after judgment does not require notice to be given to the judgment debtor, yet the courts have power to require such notice to be given before the garnishee files his answer, in order that the debtor may protect his rights, and if the money or property is exempt, have an opportunity to plead the exemption. *Id*..... 751

Guaranty.

1. Where one L. guaranteed the note of D., in consequence of which one B. delivered certain personal property to D., Held, A sufficient consideration for the guaranty. *Lamb v. Briggs*..... 139
2. Guarantor who testified in an action on note by payee against maker may, in action by payee against such guarantor, be asked on cross-examination, if on former trial he had not testified to certain facts, stating them, and his admission that he so testified will render it unnecessary to introduce proof of such testimony. But if proof that the witness so testified is afterwards introduced, ordinarily it will be error without prejudice. *Id*..... 139
3. Under Sec. 295, Civil Code, a general verdict in favor of a guarantor will not authorize a judgment against him

based on a special finding of the jury that a specified sum was due the payee from the maker of the note, there being a dispute as to whether the guaranty of L. was jointly with B. or for the whole amount. *Lamb v. Briggs*.. 139

Homestead.

1. Contract to convey homestead entered into by a wife in her own name, will not be specifically enforced, as the statute requires the instrument of conveyance to be signed and acknowledged by both husband and wife. *Larson v. Butts* 370
2. The fact that the husband and wife are not living together at the time the contract was made, will not render her contract for the conveyance of the homestead valid. *Id.*..... 370

Husband and Wife.

A contract between husband and wife, whereby he transfers his property to her upon condition that she will assume his debts, and pay the same out of the property received from him, and property inherited from her father, is valid as against the husband. *Brown v. Brown*..... 703

Information.

1. Cannot be made against one whose case has been examined by a grand jury, who report "no cause of action," and accused thereupon discharged. *Richards v. State*..... 145
2. Prosecutor cannot delegate authority to another to file information. *Id.*..... 145
3. Must be sworn to before magistrate, and not before notary public *Id.*..... 145
4. In order to authorize information, except against fugitives from justice, there must have been a previous examination based on an accusation under oath, charging the party with the commission of a crime. *Richards v. State*.. 150
5. Charging larceny, without alleging that crime was committed within jurisdiction of the court in which the information was filed, *Held*, Insufficient. *McCoy v. State* 418

Instructions to Jury.

1. Must be construed together, and if when considered as a whole they properly state the law, it is sufficient. *Campbell v. Holland*..... 588
2. When the law applicable to the pleadings and evidence has already been fully given by instructions by the court on its own motion, it is not error to refuse further instructions. *Id.*..... 588
3. General exceptions to, insufficient. *Brooks v. Dutcher*... 644

Internal Improvements.

Proposition to vote bonds in aid of, must designate the donee; an alternative proposition, even if adopted by the voters, is ineffectual to authorize issuance of bonds.

State v. Roggen..... 118

Intervention.

In action on note by indorsee, indorsor claiming to own note and entitled to proceeds thereof, may intervene and assert his rights; but where such rights are denied, if indorsor answer in another case pending against him by same plaintiff in another county, charging said plaintiff with conversion of said note and demanding judgment thereon, he waives error committed by the court in denying his right to intervene, and abandons his right of review thereof by the supreme court. *Holland v. Commercial Bank*.....

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Judgment

1. Defendant not served with process appearing before justice of peace and confessing judgment, assent of plaintiff necessary to give justice jurisdiction. *Aliter*, where creditor brings action, issues and serves process, as in such case assent of plaintiff is presumed. *Flanagan v. Continental Insurance Co.*..... 235
2. As to parties before the court, and respecting a matter within its jurisdiction, a judgment without a finding to support it is not void, but, at most, merely erroneous, and subject to reversal by a suitable proceeding in a tribunal having authority to review it. *Connelly v. Edgerton*..... 83
3. An order of a district court sustaining a motion to strike an amended petition from the files is not a final order from which error may be taken to the supreme court, in the absence of a judgment. *Welch v. Calhoun*. 166
4. Foreign judgment duly authenticated as prescribed by law, where there is jurisdiction, is conclusive as an adjudication upon the subject-matter of the suit. But fraud perpetrated in securing such judgment, and by which it was obtained, would be a good defense to an action thereon if properly pleaded. *Keeler v. Elston*..... 310

Judicial Sale.

Confirmation of sale in vacation, without notice given as required by section 498, code, is invalid. *Armstrong v. Midlestadt*.....

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Jurisdiction.

1. Presumption in favor of decision. *Aspinwall v. Sabin*... 73

2. If existing for one purpose in a case, it exists for all purposes. <i>N. & C. R. B. Co. v. Storer</i>	93
3. Of court to perfect record. <i>Id.</i>	93
4. Exists in state court, in action against national banks. <i>First National Bank v. Overman</i>	116
Justice of Peace.	
1. Under section 1001, civil code, attorney has authority to confess judgment for costs and move to set aside judgment taken by default. <i>Stanton & Co. v. Spence</i>	191
2. Error for justice, having set aside judgment rendered by default, and set cause for trial, to refuse to proceed to trial, and reinstate judgment, because costs have not been paid, or that attorney had no authority to confess judgment for costs, etc. <i>Id.</i>	191
3. Parol evidence admissible to show that date following entry of judgment relates to the time of such entry on the docket. <i>Wilkinson v. Carter</i>	186
4. Judgment by confession; effect on plaintiff. <i>Flanagan v. Continental Insurance Co.</i>	235
Landlord and Tenant. See FORCIBLE ENTRY AND DETENTION.	
Requirements of notice to quit. <i>Connell v. Chambers</i>	307
Larceny.	
1. Information, <i>Held</i> , Insufficient to support verdict in not alleging that crime was committed within the jurisdiction of the court. <i>McCoy v. State</i>	418
2. Verdict not stating value of property stolen, insufficient to sustain sentence of imprisonment in penitentiary. <i>McCoy v. State</i>	418
Legislature.	
Power to appropriate money. <i>State v. Babcock</i>	37
Lien. See DIVORCE AND ALIMONY.	
On live stock for keeping is subordinate to a previously executed mortgage thereon. <i>State Bank of Nebraska v. Lowe</i> ..	68
Limitation of Actions.	
1. Statute runs for or against school districts in the same manner as it does for or against individuals. <i>May v. School District</i>	205
2. Action on county treasurer's bond barred in ten years. <i>Merriam v. Miller</i> , 219. <i>Alexander v. Overton</i>	227
3. Continuing nuisance; recovery of damages in one action not a bar to recovery of damages thereafter sustained. <i>O. & R. V. R. R. Co. v. Standen</i>	343
4. Facts stated; "usual place of residence" determined from the facts. <i>Forbes v. Thomas</i>	542
5. On facts stated, <i>Held</i> , That defendant having been in	

adverse possession, with title derived from sale under trust deed, for more than ten years, action was barred.

McKesson v. Hawley 692

Live Stock.

Contract relative to sale of, considered, and rescission allowed. *Dakota Stock Co. v. Price* 96

Malicious Prosecution.

In an action for malicious prosecution it was claimed by defendant, who was a constable, that he had sufficient cause for making complaint, charging plaintiff with crime of burglary, his information being confession of a youth whom he had previously arrested for same crime, and which confession was voluntarily given, and by which he implicated plaintiff as being a confederate and accomplice, these facts being testified to by defendant. On his cross-examination he was asked if prior to the confession, and while the youth was in custody, he did not, in the hearing of the party under arrest, tell another constable to take him to jail and by the time he had laid there long enough he would confess, or language to that effect. Objection was made, and the objection sustained. *Held, Error. Dorsey v. Clapp*..... 564

Mandamus.

1. Does not lie against auditor for payment of claim which he has disallowed. *State v. Babcock*..... 39
2. Where railway company demurred to an alternative writ requiring it to reduce its rates and charges to conform to an order of the board of transportation, and denied the power of the board to reduce such rates and charges, *Held*, That the court would determine the question of the power of the board to make the order in question before entering upon an examination of the facts, and therefore would not permit the demurrer to be withdrawn. *State v. F., E. & M. V. R. R. Co.* 313
3. Supreme court has jurisdiction to issue writ against a railroad neglecting to comply with orders of the board of transportation relative to charges and rates. *Id*..... 315
4. Lies to compel county board to include an allowed account in its estimate for taxes. *State, ex rel. Clarke, v. Cather* 792

Maxims.

"Nullum tempus occurrit regi." *May v. School District*..... 206

Mechanic's Lien.

1. Lien exists only by virtue of statute; statute liberally construed. *White Lake Lumber Co. v. Russell*..... 126

2. Affidavit describing improvements as situated on "south-west corner" of a specified lot and block, is sufficient. *Id.* 126
3. Affidavit describing more land than is subject to lien not fatal. *Id.*..... 126
4. Where affidavit alleged that lumber was sold to A. for B., the owner of the property, and it was shown upon trial to the satisfaction of the court that material was furnished for the express purpose of making an improvement upon the property of B., these facts will support a finding that the material was sold upon a contract, to be used in the improvement named. *Id.*..... 126
5. Evidence examined and decree of court below, refusing lien, affirmed. *Wallace v. Flieschman*..... 203
6. Affidavit for, examined and Held, Sufficient. *Hays v. Mercier*..... 656
7. In case stated, mechanic's lien held superior to lien of vendor created by subsequent mortgage. *Ansley v. Pasahro*..... 662
8. While owner of a building is liable to material men and laborers under mechanic's lien law, for material furnished or labor performed for a contractor on such building, yet, as a different rule prevails for asserting such lien, the owner may plead as a defense the fact that the labor or material was furnished to a contractor and that no lien has been obtained. *Hoagland v. Van Etten*..... 682

Mortgage—Chattels.

1. Properly executed, etc., is superior to lien on stock for their keeping. *State Bank of Nebraska v. Lowe*..... 68
2. Verbal mortgage is valid. *Sparks v. Wilson*..... 112
3. On facts stated, Held, That a chattel mortgage given by one co-surety on a note to another, conditioned that the latter would release his claim upon certain property of the principal in said note, was not without consideration. *Id.* 112
4. Where mortgage is given by one co-surety to another, to secure him against a contingent liability as surety, and there is a conflict of testimony as to the amount to be secured, the question is one of fact for the jury. *Id.*..... 113
5. With possession and power of sale is presumptively fraudulent, yet may by evidence be shown to have been made in good faith. *Davis v. Scott*..... 154
6. Construction; general rules. *Newlean & Hoard v. Oleson*, 717
7. Mortgagee, authorized to sell if he "feels unsafe or insecure," cannot without cause seize and sell property before debt becomes due. *Newlean & Hoard v. Oleson*..... 717

Mortgage—Real Property.

1. In action to have deed declared a mortgage to secure the sum of \$60 debt, and \$440 to be thereafter advanced, defendant answered admitting debt, but denying agreement for future advances, and alleging that deed was intended as a conveyance upon adequate consideration consisting of board, lodging, and services rendered by the defendant to plaintiff, in all of the value of \$700. *Held*, That proof failed to establish such consideration, and the plaintiff was entitled to redeem. *Newman v. Edwards*. 248
2. A new agreement, upon a sufficient consideration, extending time of payment of a note and mortgage to a day certain, has the effect, in equity, of modifying original condition of mortgage to the same extent as if terms of new agreement were incorporated into the condition; and where it is claimed that a default has occurred after the extension by which the mortgagor would be entitled to a foreclosure, such default should be alleged in the petition in order to state a cause of action. *Eby v. Ryan*. 471
3. In case stated, *Held*, That evidence failed to establish fraudulent representations and failure of consideration. *Brown v. Baker*. 708
4. Where it is sought to give the lien of a junior mortgage precedence over the lien of a senior mortgage, the claim must be based either on an agreement to that effect or on the superior equity of the junior mortgage. *Id*. 708
5. In an ordinary action to foreclose a mortgage a decree of foreclosure and sale should be rendered, yet where a purchaser in good faith under a decree of foreclosure of a senior mortgage files a bill to require a junior incumbrancer, not a party to the action to foreclose, to redeem, within a day to be named, or be barred of the right, and it does not appear that the premises if sold would satisfy the liens prior to that of the junior incumbrance, a decree of strict foreclosure may be rendered requiring such junior incumbrancer to redeem the prior incumbrances within a reasonable time, to be named in the decree, or be barred of the right of redemption. *Miles v. Stehle*. 740
6. In an action to foreclose a mortgage given to secure two promissory notes, each for the sum of \$250, with interest, it appeared as a defense that the notes were given for an alleged stock of goods having but little or no intrinsic value and salable only as auction goods, the real value of which did not exceed \$100 dollars. *Held*, That the decree will be reduced to \$100, with interest from the date of sale. *Musselman v. Bradley*. 784

Murder.

1. Ingredients of crime stated: intent must be averred in indictment; indictment examined and held insufficient; omission not cured by the ordinary formal conclusion. *Schaffer v. State*..... 557
2. Instruction, copied from instruction numbered nine in *Williams v. The State*, 6 Neb., 334, and printed therein at page 336, criticised, and the concluding words thereof held unnecessary. *Id.*..... 557

National Banks.

- Action against, may be brought in state court having jurisdiction in similar cases. This applies to a penalty under section 5198 of U. S. Revised Statutes. *First National Bank v. Overman*..... 116

Negligence.

1. In setting out prairie fire is question for jury. *Powers v. Craig*..... 621
2. Injury by street railway. *Brooks v. Lincoln Street R'y Co.*..... 816

Negotiable Instruments.

1. Upon answer alleging alteration of guaranty, *Held*, That the question must be submitted to the jury, whose duty it was to answer special interrogatories submitted relative to such alteration. *Lamb v. Briggs*..... 138
2. Where a promissory note payable to order is endorsed by the payee and transferred to two persons, who bring an action thereon as "H. & A. F. Randolph, partners, etc.," *Held*, 1st. That the testimony tended to sustain the allegation of partnership. 2d. That H. & A. F. Randolph, being the lawful holders of the note, if not partners, could in their individual names maintain an action thereon as "H. & A. F. Randolph." *Wolgamood v. Randolph*..... 493
3. Action on note; satisfaction by conveyance of property; defect of title; measure of damages is amount of incumbrances or value of property. *Downie v. Ladd*..... 531
4. Draft had written on its face "Excepted," *Held*, A valid acceptance. *Cortelyou v. Maben*..... 697
5. Parol evidence that such was purpose of the indorsement, *Held*, Admissible. *Id.*..... 697
6. A stranger presented to the bank of O. a check purporting to be drawn by one C. on the bank of A. for \$385. The cashier of the bank of O. compared the signature of the purported drawer with his genuine signature in a book kept by such cashier, and paid the check without requiring proof as to the identity of the person presenting

the same or making inquiries in regard to him. The check was sent to a bank in Lincoln, and there credited to the bank at O., and by the Lincoln bank sent to the bank at A., on which it was drawn, and was paid by such bank. Several days afterwards it was discovered that the check was a forgery, and notice was thereupon given to the bank at Lincoln, and also at O. *Held*, That the bank at O. was liable for the amount received by it on the check. *First National Bank v. State Bank*..... 769

Notice.

Promise to act upon verbal notice, does not amount to waiver of a written one. *Sandwich Mfg. Co. v. Feary*..... 66

Nuisance.

Where a nuisance is a continuing one, in consequence of which damages are sustained, a recovery is limited to damages which may have accrued before the action is brought, and one action is not a bar to a second action brought for damages thereafter sustained. *O. & R. V. R. R. Co. v. Standen*..... 343

Parties. See DIVORCE AND ALIMONY. INTERVENTION.

1. The real party in interest under section 29 of the Code is the person entitled to the avails of the suit. *Hoagland v. VanEtten*..... 681
2. Mere assignee having no interest in the result of suit, but who obtains an assignment upon a promise to pay assignor amount he may derive from the action, is not the real party in interest, and cannot maintain the action. *Id.*..... 681

Partnership.

1. Action for goods sold and delivered; preponderance of evidence showing existence of partnership; judgment not set aside as against weight of evidence. *Atwood v. Peregoy*..... 238
Atwood v. Kennard, Motter & Co...... 246
2. Where firm is insolvent, partnership property will be applied to partnership debts, and creditor of member of firm cannot be paid out of partnership property to exclusion of creditors of firm. *Rothell v. Grimes*..... 526
3. Mortgage of partnership goods, given to secure sureties on bond of member of firm for faithful performance of his duties as guardian, not available as against creditors of insolvent firm. *Id.*..... 526
4. In an action against a firm by its firm name, the summons may be served by a copy left at its usual place of doing business within the county, with one of the members,

or with the clerk or general agent thereof. And where an action is properly brought, but personal service cannot be had upon any of the above named persons, it may be made by publication. *Rosenbaum & Co. v. Hayden & Co.*..... 744

5. A partnership is a distinct entity, having its own property, debts, and credits. For the purpose for which it was created it is a person, and as such is recognized by the law. *Id.*..... 744

6. H. & Co. were doing business in Red Willow county, and an action was brought against such firm in that county, and an attachment issued and levied upon certain firm property. Service was had by publication, and on the day set for hearing the defendant appeared and objected to the jurisdiction of the court, for the reason that the firm consisted of W. H. H. and no other person, and that since the commencement of the action he had been a resident of Adams county. *Held*, That as he had contracted the debts in a firm name, and thereby received the benefit to be derived from a partnership name, he could not thereby divest himself of the burdens incident thereto, one of which was the right to bring an action in the county in which the alleged firm was doing business. *Held*, Also, that having received credit as a firm, he was as to creditors estopped to deny that relation. *Rosenbaum & Co. v. Hayden & Co.*..... 744

Payment.

Evidence of, in case stated, considered. *Hammond v. Jewett & Co.*..... 363

Petition.

1. In action against constable and sureties on official bond, *Held*, Sufficient after verdict. *Hoke v. Halverstadt*..... 421
2. In action against sheriff for unlawful imprisonment, *Held*, Sufficient. *Berrer v. Moorhead*..... 687
3. Defective, may be amended. *Id.*..... 688

Pleading.

1. Where an action is brought by parties by the initials of their christian names, instead of the names, the remedy of the adverse party is by motion to require the full christian names to be set out in the pleading, and unless such objection is made it will be waived. *Walgamood v. Randolph*..... 493
2. If pleading susceptible of amendment, such amendment should be permitted. *Berrer v. Moorhead*..... 688

Prairie Fire.

1. Question of negligence in setting out is one of fact for jury. *Powers v. Craig*..... 621

2. Facts stated; failure to burn or plow fire guards not contributory negligence. *Id.*..... 621

Presumption.

- In favor of correctness of decision of court. *Aspinwall v. Sabin*..... 73

Principal and Surety.

1. Where in an action on an indemnifying bond signed by three sureties, but not by the principal, the petition alleged "That said indemnity bond was executed and delivered by the said defendants for the purpose of saving harmless the said plaintiff in the levy and sale of the property aforesaid, and was delivered to the plaintiff by the Norwegian Plow Company, with the consent of the said defendants for that purpose," *Held*, If the allegations of the petition were true that the sureties had waived the signing of the bond by the principal. *Bollman v. Pasewalk*..... 761
2. Where an indemnifying bond signed by three sureties was voluntarily given to an officer, conditioned that "if the above bounden Norwegian Plow Company shall well and truly save harmless and indemnify the said W. L. Rothwell, and any and all persons assisting him in the premises, from all harm, trouble, damage, costs, suits, actions, judgments, and executions that shall or may at any time arise, come, or be brought against him, them, or any of them, then this obligation to be void," which bond was not signed by the principal, the officer having sold the goods and applied the proceeds on the executions, and afterwards judgment was recovered against him for the value of the goods, *Held*, That the obligors signing the bond were liable thereon. *Id.*..... 761

Prosecuting Attorney. See INFORMATION.

- Where appointment of a deputy prosecuting attorney is challenged, and there is no copy of his appointment, or evidence that he took oath, or gave bond as required by law, the proof is insufficient to show his appointment as deputy. *Richards v. State*..... 146

Railroads. See STREET RAILROADS.

1. Under the statute, as it stood prior to the act of March 31, 1887, in order to appeal from the assessment of damages which the owner of any real estate had sustained by the appropriation of his land to the use of any railroad corporation, it was only necessary to file in the office of the clerk of the district court of the proper county, within sixty days after the filing of the report containing the award of such damages with the county judge, a tran-

- script of the condemnation proceedings upon which such award of damages was made. *N. & C. R. R. Co. v. Storer.* 90
2. A paper headed "Transcript," but consisting of a certified copy only of the report of the commissioners appointed by the county judge to assess the damages, etc., containing their assessment and award of damages, *Held*, Sufficient to give appellate court jurisdiction of the cause. *Id.*..... 90
3. A proposition submitted to the voters of a county in which it is proposed to vote the bonds of such county to a railroad company must designate the donee. A proposition in the alternative, to issue to a certain corporation named, or to another designated corporation, is ineffectual to authorize the issuing of bonds, even if adopted by the legal voters. *State, ex rel. Gardner, v. Roggen.*..... 118
4. Bonds issued by county as a donation to, are invalid unless they have endorsed thereon, certificate of auditor and secretary of state, showing that they were issued pursuant to law. *Id.*..... 118
5. Street railroads in city; consent of electors, vote required. *State, ex rel. Omaha Street Railway Co., v. Bechel.*..... 158
6. The act to regulate railroads and to prevent unjust discrimination, approved March 31, 1887, provides that all charges made for services rendered, or to be rendered, by any railway company in this state, in the transportation of passengers or property, shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful; and requires such railway company to print and keep for public inspection, schedules showing the rates, and fares, and charges, which have been established and are in force at the time upon such railroad. *Held*, That the board of transportation has authority to determine, in the first instance, what are just and reasonable charges for the services rendered, or to be rendered on such railways. *State, ex rel. Board of Transportation, v. F., E. & M. V. R. R. Co.* 314
7. The act in question prohibits any preference or advantage to any particular person, company, corporation, or locality on any particular description of traffic in any respect, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any prejudice, or disadvantage in any respect, and places the general supervision of all railroads within the state in the board of transportation, and requires it carefully to investigate any complaints made in writing, and under oath, concerning any unjust discrimination against any person,

- firm, corporation, or locality, either in rates or facilities furnished, in order to prevent unjust discriminations against either persons or places. *Id.*..... 314
8. The word "locality," mentioned in the statute, means the territory unjustly discriminated against, and may be a village, city, county, or portion of the state. *Id.*..... 314
9. The power to determine what is an unjust rate and charge, and the extent of the same, and to prevent unjust discrimination, carries with it the power to decide what is a just rate and charge, and authorizes the board to fix just and reasonable rates and charges. *Id.*..... 314
10. The finding of fact by the board of transportation, in any matter submitted to it under the above statute for determination, is *prima facie* evidence of the existence of such facts, and of the reasonableness of an order made by said board in pursuance thereof. *Id.*..... 314
11. Negligent construction of bridge; petition examined and held sufficient to authorize recovery of damages. *O. & E. V. R. R. Co. v. Standen.*..... 343
12. Where a railway bridge is so negligently constructed across a river as to form an unlawful obstruction, and become a nuisance by causing an overflow of the river, no right of action accrues to a landowner until he sustains an actual injury caused by such unlawful obstruction—as by the overflow of his lands. *Id.*..... 343
13. Failure of servants of company to give statutory signals at crossing when running at a high rate of speed and not upon regular time, are to be considered in deciding whether such company was guilty of negligence, and whether a person injured at crossing used due care in attempting to cross. *O., N. & B. H. R. R. Co. v. O'Donnell.*..... 475
14. The question as to whether a person injured by a passing train at a railroad crossing was guilty of negligence in attempting to cross is usually a question of fact to be decided upon all the circumstances of the case as shown by the evidence. *Id.*..... 475
15. Only railroad companies organized under the laws of this state have the right to condemn right of way across lots owned by the state. *State v. Scott.*..... 628
16. No foreign railroad corporation doing business in this state can exercise the right of eminent domain or have power to acquire right of way or real estate for depot or other uses unless it organize as a corporation under the laws of this state. *Id.*..... 628
17. The C., B. & Q. R. R. Co. and the L. & N. W. R. R. Co. were joined as relators in an application for mandamus

- to compel the proper authorities to condemn and convey certain lots belonging to the state. *Held*, That the C., B. & Q. R. R. Co., being a foreign corporation, was not entitled to the relief, and that as a foreign corporation is prohibited from acquiring a right of way or real estate for depot or other uses, therefore it cannot do indirectly what it is prohibited from doing directly. *Id.*..... 628
18. The foreman of a company of men engaged in the business of repairing bridges, water-tanks, and telegraph lines on a line of a railway, who has power to control and direct the movements of his men, will render the company liable for acts of negligence committed by him in the course of his employment, whereby one of the men under his control, without his fault, is injured. *S. C. & P. E. R. Co. v. Smith*..... 775
19. A company of men under the control of a foreman engaged in the business of repairing bridges, water-tanks, and telegraph lines along a line of railway, in going to and from their labor on a hand car on such railway, are under the control of such foreman, and his principal is liable for his negligence occurring in the course of his employment. *Id.*..... 775
20. Instructions set out in opinion, *Held*, Properly given. *Id.*..... 775
21. Duties of car drivers on street railways. *Brooks v. Lincoln Street Ry. Co.*..... 816

Rape.

Not essential to conviction that prosecutrix should be corroborated by testimony of other witnesses as to the particular act constituting the offense. Sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn. *Fager v. State*..... 332

Real Estate. See TRUST DEED.

1. Equity protects a parol gift of land equally with a parol agreement to sell it, if accompanied by possession, and the donee, induced by the promise to give it, has made valuable improvements on the property. *Dawson v. McFaddin*..... 131
2. The mere fact that a grantor in a deed is insolvent will not render the conveyance of real estate made by him to a creditor upon adequate consideration fraudulent and void. *Joiner v. Van Alstyne*..... 172
3. A purchaser of real estate who takes his deed to the

office of the register of deeds and deposits it with him for record, and pays the fees for recording and entering the same on the numerical index, discharges thereby his duty of notice to the public; and if, through the fault alone of the register, the deed is lost or mislaid, and not entered of record or entered on the index, such failure will not work to the prejudice of the title of such purchaser, even in favor of a subsequent purchaser without actual notice.

Perkins v. Strong..... 725

Registration of Voters.

1. Under the constitution of the state of Nebraska, which prescribes the qualifications of voters, and provides that all elections shall be free, and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise, a registration law which absolutely deprives an elector of the right to vote unless registered on one of four days, the last one being ten days prior to the election, is void. *State, ex rel. Stearns, v. Corner*..... 265
2. A registry law, so far as it provides for a register of qualified electors to be made, and which constitutes such registration one mode of proof of the elector's right, and so far as it might require an elector whose name is not upon such register to make other reasonable proof of his right to the judges of election at the time of offering his vote, would be valid. But where it absolutely deprives the elector of his vote unless previously registered upon certain days named in the law, it is void. *Id.*..... 266
3. A registry law, to be valid, must be reasonable and impartial, and calculated to facilitate and secure the constitutional right of suffrage, and not to subvert, or injuriously, unreasonably, or unnecessarily restrain, impair, or impede the right. *Id.*..... 266
4. The act "to amend the election laws for metropolitan cities and cities of the first class in the state of Nebraska" (Laws 1887, 394), being in contravention of that clause of the constitution that "no bill shall contain more than one subject, which shall be clearly expressed in its title, and no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed," is void. *Id.*..... 266

Religious Society.

1. Where there is a schism in a religious society a court of equity does not attempt to enforce the peculiar faith or doctrines of either party, though their existence and nature may incidentally be involved in an inquiry relative to the

rights of such society. All that it does is to enforce the observance and execution of an ascertained trust. *Rottman v. Bartling*..... 375

2. Where a separation has taken place, a court in determining the question of legitimate succession will adopt the rules of such society, and enforce its polity in the spirit and to the effect for which it was designed. *Id*..... 375
3. Where a church has been organized and a constitution adopted and signed by its members, under which the church has existed for a series of years, such constitution can be changed only in the manner provided therein, or by the rules or by-laws of such society; and where the constitution provides for a three months' notice of any proposed change in the constitution, a change effected without giving such notice is invalid and of no effect. *Id*..... 375
4. Where certain members and officers of the Evangelical Lutheran church, without giving the notice required by the constitution and complying with its terms, joined "*Die Erste Deutsche Evangelische Zion's Gemeinde*," Held, That having ceased to be members of the Lutheran church, they were not entitled to the possession of the property of such church. *Id*..... 375

Replevin.

1. Verdict, *Held*, Sufficient. *Connelly v. Edgerton*..... 83
2. Judgment in alternative against plaintiff; execution issued; plaintiff points out property; officer refuses to receive it and returns execution unsatisfied; plaintiff files in court written offer to return, which is accepted on condition that *all* the property is returned, but offer is attempted to be withdrawn soon after filing of acceptance, it was *Held*, Upon a plea in abatement to proceedings in error prosecuted in the supreme court by plaintiff, that the filing of the offer and of the conditional acceptance did not constitute a waiver of error by plaintiff nor satisfy the judgment, the conditions of the acceptance not being agreed to. *Williams v. Eikenbary*..... 210
3. Where an officer attaches property which is subsequently replevied from him by a stranger, who claims title and the right to its possession, and such officer seeks to justify his possession under his attachment process, it is incumbent upon him to prove his authority by the order of attachment, in order to show his right to possession, and the measure of his damages, if successful in the suit. *Id*..... 211
4. Defenses by officer denying generally the allegations of the petition and also pleading affirmatively his official character, and justifying seizure under an order of attach-

ment, alleging ownership of the property to be in the attachment defendant; *Held*, That defenses were not inconsistent, and that decision of trial court in overruling motion to require defendant to elect upon which of defenses set up in his answer he would proceed to trial was correct. *Id.*..... 211

Sale.

1. Of cattle in case stated; delivery of possession should be where ranch and cattle are, convenient and proper, in view of the nature of the business. *Dakota Stock Co. v. Price.* 106
2. Of goods, without samples, upon warranty as to quality, for the purpose of combining the same, with other material ordered, in manufacturing; if part upon trial prove defective and worthless, and upon comparison it was found that the remainder was of the same general character and apparent quality, and that the further use of it in the manufacture would necessarily result in a loss to the purchaser and manufacturer, he would be justified in refusing to further use it, and holding it for the use of the vendor. In such case, where the purchaser acted in good faith, there would be no liability for the purchase price. *Cooper & Co. v. Hall.*..... 168
3. The evidence tends to prove that the plaintiff purchased one-half interest in the property in litigation, at a certain date, he then being in possession as agent, and continued in possession until a subsequent date, when he purchased the remaining one-half interest. The question being the *bona fides* of both of said purchases and sales: *Held*, That the declarations of the vendor as to his interest in, and ownership of, said property, made after said first purchase and sale, but before the last one, were admissible in evidence for the purpose of impeaching the plaintiff's title, but that such declarations made after the last purchase and sale were inadmissible. *Campbell v. Holland.*..... 587
4. Where there is testimony tending to show that an order in favor of one S., upon the firm of C. & C., was orally accepted by said firm, and paid to S. in goods, it is not error for the court to refuse to instruct the jury that, notwithstanding the oral acceptance of said order by C. & C., they could sue said S. for the value of the goods obtained by him upon said order. *Camp & Compton v. Sadler.*..... 732

Schools and School Districts.

1. Duties of members of school district board, or of moderator and director, can only be performed by their action in conjunction; director has no power alone to declare office

- of treasurer vacant, or call special meeting. *State, ex rel. Carter, v. School District No. 49, Saline County*..... 48
2. The legal maxim, "Lapse of time does not bar the right of the state," can only apply in favor of the sovereign power, and has no application to school districts or other municipal corporations deriving their power from the sovereign. The statute of limitations runs for or against school districts in the same manner as it does for or against individuals. *May v. School District*..... 205
3. The case of *Brewer v. Osce County*, 1 Neb., 373, commented upon and distinguished. *Id*..... 205
4. Where an application is made to the court for mandamus to compel the levying of taxes for the payment of bonds issued by a school district, and it is apparent that the tax if levied in one year would be a burden upon the taxpayers of such district, the court, as a condition of granting relief, may apportion the levy over such number of years as not to be oppressive. *State v. School District*.... 700
- Service by Publication.**
- Where by notice by publication a defendant was required to answer on the forenoon of the day on which by law the answer should have been filed, *Held*, That the notice was not therefore invalid, but that the defendant had the entire day in which to answer. *Armstrong v. Middelstadt*..... 711
- Sheriff.**
- Action against, for unlawful imprisonment; petition, *Held* Good. *Berrer v. Moorhead*..... 687
- Slander.**
- In action for damages for defamation of character, when the speaking of the words are admitted and their truth alleged in justification, it is error without prejudice to permit a witness to testify to the speaking of words of substantially the same meaning and import, and give, as his understanding of the words used, the same meaning as is charged in the petition and justified in the answer. *Brooks v. Dutcher*. 644
- Specific Performance.**
1. Evidence examined and contract enforced. *Hughes v. Reese*..... 78
2. Contract in case stated enforced. *Dawson v. McFaddin*. 131
- State of Nebraska.**
1. Appropriations by legislature extend to end of first fiscal quarter after adjournment of regular session. *State, ex rel. Bullock Mfg. Co., v. Babcock*..... 33
2. Appropriation for sinking test well in salt basin. *Id*.... 33
3. Fiscal year commences first of December. *Id*..... 33

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Street Railroad.

1. Where the question of giving consent to a street railway company to construct and maintain a street railroad upon the streets of the city of O. was submitted to the electors of said city on the day of the general city election, and the ballot upon that proposition was taken at the same place, by the same election officers, and but one poll list made, and the votes were canvassed and returned, in some of the precincts and wards, upon the same tally sheet and return; but in all of the wards a separate ballot box was prepared into which the vote upon the proposition was deposited, but without other formality to separate the vote from the vote of the general election, it was held that in order to give the required consent the affirmative of the proposition must receive a majority of all of the votes cast at such election. *State v. Bechel*..... 158
2. It is not negligence *per se* to travel along a public highway by the side of a street railway track on which a car is moving in the same direction as the party traveling, unless such party places himself in such position as to be run over or injured by such street car. *Brooks v. Lincoln Street Railway Co*..... 816
3. The driver of a horse car on a street railway, in driving horses attached to such car, must sit or stand on the front platform or place provided for him, must maintain control of the horses, and exercise a reasonable degree of care and watchfulness to prevent collisions and injury to persons crossing or traveling on or over such street. *Id.*..... 816

Summons. See SERVICE BY PUBLICATION.

Service on partnership. *Rosenbaum & Co. v. Hayden & Co.*... 744

Swamp Lands.

- Proceedings under Ch. 89, Comp. Stat., in establishing ditches and drains; jurisdiction of county board; objections should be made before improvement completed. *County of Dakota v. Cheney* 437

Taxes.

1. Where a plaintiff files a petition to cancel a tax deed upon his land and remove a cloud from his title thereto, as a condition of granting relief, he will be required to do equity by paying the taxes justly chargeable against said land. *Dillon v. Merriam*..... 151
2. An allegation, "That all proceedings of said treasurer and the defendant Merriam were unlawful and void, and irregular in this: that said land was not assessed for taxes in the years 1863 and 1865, as required by law, and no taxes for the years 1863 and 1865 were levied thereon, as required by law, and said land was not advertised for sale for the taxes of 1863 and 1865, as required by law," without stating in what respect there was a failure to comply with the law, is not sufficient to justify a court in holding that the taxes so assessed were invalid. *Id*..... 151
3. Where for want of authority of the treasurer to sell land for taxes no title passes to the purchaser, he is merely subrogated to the rights of the county, and to the same rate of interest that the county would be entitled to recover. *Id*..... 151
4. Property used exclusively as an institution of learning is exempt from taxation while so used. *Omaha Medical College v. Rush*..... 449
5. Where, in an action to foreclose a tax lien on real estate, the petition and affidavit for publication were duly sworn to on the 5th day of March, 1883, in Madison county, Nebraska, and filed in the office of the clerk of the district court of Pierce county on the succeeding day, *Held*, That the affidavit for publication was sufficient to authorize service on the defendant by publication. *Armstrong v. Middlesadt*..... 711

Tender.

1. A check drawn against funds actually in bank, answers every legal purpose, unless objected to as not a legal tender of money. *Dakota Stock Co. v. Price*..... 108
2. To be effectual must be unconditional. *Williams v. Eikenbary* 215
3. Acceptance of, must be unconditional. *Id*..... 215

Trial.

1. Where parties have made up issues without objection to

- particular form of action, they will be held to have waived any errors in that regard. *Downie v. Ladd*..... 532
2. Where a cause is tried to a jury and their verdict is set aside and a new trial granted, and the second trial results in substantially the same verdict, upon which a judgment is rendered by the trial court, and for the reversal of which proceedings in error are prosecuted in the supreme court, a petition in error being also filed by defendant in error, by which he seeks to have judgment rendered on the first verdict, the action of the district court will not be disturbed, it being apparent that the last verdict was sufficient to cover the damage proven on either trial. *O. N. & B. H. R. R. Co. v. O'Donnell*..... 475
 3. Right of trial judge to question witnesses not denied, but practice of so doing, except when absolutely necessary, should be discouraged. *Fager v. State*..... 332
 4. Where testimony is such as would warrant jury in finding guilt, it is error for court to direct verdict of acquittal. *State v. Sneff*..... 481
 5. Negligence in setting out prairie fire, question for jury. *Powers v. Craig*..... 621
 6. Upon answer alleging alteration of guaranty by the erasure of the name of B. after execution and delivery of guaranty by L., *Held*, That question must be submitted to jury, and it was the duty of jury to answer special interrogatories submitted to them relating to such alleged alteration. *Lamb v. Briggs*..... 138
 7. Where a mortgage is executed by one co-surety to another, to secure him against a contingent liability as surety, and there is a conflict in the testimony as to the amount to be secured, the question is one for the jury. *Sparks v. Wilson*..... 113
 8. Where, upon a motion for a new trial founded on affidavits, all of the material facts contained in such affidavits are contradicted by affidavits in resistance, the judgment of the trial court denying such motion will ordinarily be upheld. *Campbell v. Holland*..... 589
 9. A new trial will not be granted on account of newly discovered evidence merely cumulative in its character. *Id.*..... 589
Brooks v. Dutcher..... 644
 10. Where action is against two defendants, evidence being sufficient as to one, but insufficient as to the other, and verdict and judgment being against both, if one against whom the evidence was insufficient made no motion for new trial as to himself alone, the judgment will not be disturbed. *Hoke v. Halverstadt*..... 421

11. Motion for new trial not necessary to obtain review of judgment sustaining demurrer to petition in equity. *Hays v. Mercier*..... 656

Treasurer—County.

1. Action on bond barred in ten years. *Merriam v. Miller*.. 219
Alexander v. Overton..... 227
2. Where a county treasurer is in default in respect to the county, state, school district, precinct bond, city, and other funds, and his bond has been canceled and bondsmen discharged by a judgment of the district court of the proper county, an action will lie against him in the name of the proper county for all such funds in respect to which he is a defaulter. *Thorne v. Adams County*..... 825

Trust Deed.

On the 12th day of February, 1872, A executed to B a trust deed to secure the payment of a sum of money due April 12th, 1872. The trust deed provided, among other things, that if the notes were not paid at maturity the trustee should advertise and sell the real estate and convey a fee simple title to the purchaser. The notes were not paid at maturity. On the 7th day of June, 1872, the trustee advertised and sold the real estate to the highest bidder according to the terms of the trust deed. On the 12th day of September, 1873, the purchaser at the trustee's sale conveyed the property to another by warranty deed. On the 5th day of October, 1874, the property was again sold and conveyed by warranty deed, and on the 29th day of April, 1876, defendant purchased the same and received a similar conveyance. Defendant and her grantors were in open, notorious, and adverse possession of the property for more than ten years prior to the commencement of this action, which was to redeem the property from the trust deed. It was held that the statute of limitation had run and that plaintiff's cause of action was barred. *McKesson v. Hawley* 692

Vendor's Lien. See DEED. REAL ESTATE.

1. For unpaid purchase money does not exist. *Ansley v. Pasahro*..... 662
2. In case stated, *Held*, That mechanic's lien was superior to lien of vendor created by mortgage subsequent to purchase. *Id.*..... 662

Verdict.

1. So clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through mistake, or some means not apparent in the record, will

- be set aside and a new trial awarded. *Sandwich Mfg. Co. v. Feary*..... 53
2. Where testimony is conflicting and pretty evenly balanced, finding of jury thereon will not be disturbed even if testimony seems to preponderate in favor of the losing party. *Forbes v. Thomas*..... 541
3. Where a cause is submitted to a jury upon conflicting testimony, there being no objection to the instructions of the court, and the verdict is consistent with the line of testimony presented by one of the parties to the suit, an appellate court will presume that the jury adopted the line of testimony with which their verdict corresponds. *Cooper & Co. v. Hall*..... 168
4. Where there is a conflict in the testimony and it is nearly equally balanced, a verdict will not be set aside as being against the weight of evidence. *Driscoll v. Troughton*..... 261
5. Where an issue is presented by the pleadings, the verdict of a jury thereon cannot be sustained, unless supported by some evidence. *Hammond v. Jewett and Co.*..... 363
6. General, in favor of guarantor, will not authorize judgment against him based on special finding of jury that a specified sum was due the payee from the maker. *Lamb v. Briggs*..... 139
7. Special findings of a jury must be consistent with each other upon material questions, and inconsistent with the general verdict, before a trial court will be justified in rendering judgment upon them, rather than upon the general verdict. *Williams v. Eikenbary*..... 211
8. In case of larceny must state value of property stolen. *McCoy v. State*..... 418
9. In action of replevin, *Held*, Sufficient. *Connelly v. Edgerton*..... 83
- Waiver.**
1. Of written notice in case stated. *Sandwich Mfg. Co. v. Feary*..... 64
2. Promise to act upon a verbal notice does not amount to a waiver of a written one. *Id.*..... 66
- Warranty.**
- Of harvester and binder in case stated; verdict against evidence. *Sandwich Mfg. Co. v. Feary*..... 53
- Water Course.**
- A and B were owners of adjoining lands over which the waters of Spring branch flowed without any definite channel. A, to protect his land against such flow, dug a ditch along the line between himself and B, and raised an em-

bankment along said ditch, and thereby obstructed the natural flow of water from the land of B. B thereupon enjoined A from keeping up said embankment, and a decree by stipulation was entered whereby A was required to make and keep three openings, each at least one rod in width in such embankment. Afterwards the lands of B were overflowed by the waters of Spring branch being thrown back upon them. A verdict having been returned in favor of B for \$275 damages, *Held*, First, that if the overflow was caused by A closing the openings in the embankment in question, he was liable for the damages resulting therefrom. Second, there being a direct conflict in the testimony as to the character of the embankment and the cause of the injury, the case was one proper to submit to a jury. *Stewart v. Schneider*..... 286

Witnesses. See EVIDENCE.

1. Where, in the examination-in-chief of a witness, a question is asked to which objection is made, which is sustained, the party desiring the evidence must offer to prove the facts sought to be established, before error can be assigned upon such ruling. *Connelly v. Edgerton*..... 82
2. Where part of a conversation is given in evidence witness may be cross-examined or re-examined as to the whole thereof. *Campbell v. Holland*..... 588

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